AMENDMENT OF THE FEDERAL TORT CLAIMS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

REFORM OF THE FEDERAL TORT CLAIMS ACT

JUNE 20, 21, 27, JULY 18, AND AUGUST 1, 1979

Serial No. 96–19

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AMENDMENT OF THE FEDERAL TORT CLAIMS ACT

WEDNESDAY, JUNE 20, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10:25 a.m., in room 2141 of the Rayburn House Office Building, the Honorable George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Mazzoli, Hughes, McClory, Moorhead, and Kindness.

Staff present: William P. Shattuck, counsel; James H. Lauer, Jr., assistant counsel; Alan F. Coffey, Jr., associate counsel; and Florence McGrady, clerk.

Mr. DANIELSON. The hour of 10 o'clock having arrived some time ago, I have just invoked a new rule, and a quorum is present.

We are most happy to have with us this morning, as our first witness in our hearing on the bill H.R. 2659, Deputy Attorney General Benjamin R. Civiletti of the Department of Justice. I know Mr. Civiletti has worked very long and hard and given a lot of though to the formulation of this bill which addresses a very important matter of public policy, and without any more ado, Mr. Civiletti, let us hear from you.

TESTIMONY OF BENJAMIN R. CIVILETTI, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. CIVILETTI. Thank you very much, and good morning, Chairman Danielson. It is a pleasure to appear before the subcommittee, and particularly on a subject that is so important to employees in the Federal Government and to law enforcement employees, and in which the Department of Justice has had a deep and continuing interest.

The enactment of H.R. 2659, which would make the Government liable for constitutional torts and the exclusive defendant in all tort suits involving government employees acting within the scope of their employment, would be a major benefit not only to the Government employees going about their duties, at times under substantial risk, but would be a major benefit in those instances to the victims of mistakes and wrong-doings.

As you know, Attorney General Bell supported such legislation before this subcommittee, and although a bill was reported out by the subcommittee, the 95th Congress adjourned before the legislation could be considered by the full committee.

Perhaps I should ask, Mr. Chairman, that my formal statement in its totality be submitted for the record, and I will simply highlight some of the points, rather than read the entire testimony, although it is not terribly long.

Mr. DANIELSON. Thank you. There is no objection, and it will be received in the record in its entirety.

[The prepared statement of Mr. Civiletti follows:]

STATEMENT OF BENJAMIN R. CIVILETTI, DEPUTY ATTORNEY GENERAL

Mr. Chairman and Members of the Subcommittee. I am pleased to appear before this Subcommittee to support the enactment of H.R. 2659, legislation which would make the Government liable for constitutional torts and the exclusive defendant in all tort suits involving Government employees action within the scope of their employment. As you know, Attorney General Bell supported such legislation before this Subcommittee in February, 1978,[1] and although a bill was reported by this Subcommittee,[2] the Ninety-fifth Congress adjourned before the legislation could be considered by the full committee.

A brief description of the current law of Government and employee tort liability will, I think, demonstrate that there is even more need for the legislation now than there was in 1977 when we submitted the proposal to the Congress.[3]

The existing Tort Claims Act is quite straightforward: with a few specific exceptions,[4] the Government is liable for tort claims based on the negligent or wrongful act or omission of any Government employee while acting within the scope of his office or employment, such liability to be determined "in the same manner and to the same extent as a private individual under like circumstances."[5]

Although Congress has enacted several specific provisions that make the Government the exclusive defendant in certain situations,[6] nothing in the basic Tort Claims Act prevents a plaintiff from bringing suit against the individual employee either directly or as a co-defendant with the Government.

In 1971, the Supreme Court, In *Bivens* v. *Six Unknown Named Agents,*[7] declared that a specific Congesssional authorization was not needed to make individual employees liable to persons whose Fourth Amendment rights had been violated. Although subsequent *Bivens* actions have subjected a number of employees to litigation and exposed a much greater number of employees to the fear of litigation,[8] only seven money judgements have ever been entered against Federal employees on *Bivens* claims, in spite of the fact that several thousand lawsuits have been files.[9]

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[1] See "Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary," 95th Cong., 2d Sess. (1978) at 1 (hearinafter referred to as "House Hearings").

[2] See Committee print of H.R. 9219, 95th Cong., 2d Sess., dated July 31, 1978.

[3] See September 9, 1977 letter from Attorney General Bell to the Speaker of the House of Representatives.

[4] See 28 U.S.C. 2680.

[5] 28 U.S.C. 1346(b), 2672, and 2674.

[6] E.g. 28 U.S.C. 2679(b) (drivers of motor vehicles); 38 U.S.C. 4116 (medical personnel employed by the Veteran's Administration); 26 U.S.C. 7426(d) (employees levying on property to collect federal taxes are immune from suit brought by persons other than the taxpayer claiming an interest in the property); 28 U.S.C. 1498 (employees sued for patent infringement); 46 U.S.C. 745 (employees sued for unlawful seizure of sea going vessels).

[7] 403 U.S.C. 388 (1971).

[8] See e.g. "House Hearings" at 31 (statement of John S. McNerney).

[9] With the exception of *Askew* v. *Bloemker*, S-Civ-73-79 (S.D. Ill., Sept. 29, 1978), all of these cases are pending on appeal. In *Askew* a DEA agent was held liable for violating the Fourth Amendment rights of three plaintiffs by breaking into their house and and conducting a search without probable cause or a warrant; the jury awarded damages of $22,000; prior to the verdict, plaintiffs agreed not to enforce any judgement against the Federal agent, who was not insured, but rather to proceed against several defendant state employees who had liability insurance. The six other cases: *Seguin* v. *Hightower*, No. C76-182-V (W.D. Wash., Oct. 24, 1978), (customs agent held liable to one plaintiff, the owner of a car used in a smuggling scheme, because the agent waited four and one-half months before instituting a forefeiture action; court awarded plaintiff $7,300 for rental value of car plus consequential damages); *Jihad* v. *Carlson*, CA No. 5-71-805 (E.D. Mich., Oct. 18, 1976), prison guard held liable for $992 in damages to inmate for violating his right to religious freedom after the inmate was placed in segregation for refusing to shave his beard, which the inmate claimed was necessary to the practice of his religion); *Weiss* v. *Lehman*, CA No. 375-36 (D. Idaho, July 14, 1978), (Forest Service ranger ordered to pay $1,000 to a single plaintiff on the theory that the ranger had violated plaintiff's Fifth Amendment rights by destroying plaintiff's property); *Halperin* v. *Kissinger*, 424 F. Supp. 838 (D.D.C. 1976) and 434 F. Supp. 1193 (D.D.C. 1977), (held that Richard Nixon, John Ehrlichman, and John

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Although the current Tort Claims Act does not cover so-called constitutional torts, a 1973 amendment extended the statute's provisions to "acts or omissions of investigative or law enforcement officers of the United States Government [based on claims] arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.[10]

In a few specific situations, Congress has elected either to make the Government liable for specific acts of its employees or to make the individual employee liable, and with the exception of the wiretap statute,[11] these statutes[12] would not be affected by our proposal.

However, in actual practice the law of Government and employee tort liability provides no coherent whole. From the standpoint of the Government official or employee, the present law is irrational. While the driver of a negligently driven Government vehicle cannot be sued,[13] the President and certain members of the United States Senate have been sued as individuals for monetary damages based on the allegedly wrongful disposal of the Panama Canal.[14] While an employee cannot be sued for the unlawful seizure of a sea going vessel,[15] an employee can be sued for the wrongful siezure of other items.[16] While tax collectors under some circumstances are immune from suit,[17] customs collectors are not. Government lawyers in those instances in which they represent individuals can be sued for malpractice, most Government doctors cannot.[18] Although Government employees cannot be sued individually for patent infringement,[19] Government flight controllers have been sued as individuals for damages arising from airplane disasters.[20]

Current law seems unfair from the standpoint of the victim of a constitutional tort. The Government is liable only for constitutional torts arising from assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process, and then only if the tort feasor is an "investigative or law enforcement officer".[21] Of course, the Government can defend by asserting the "good faith" or qualified immunity of its employees [22]—a defense which of course the employee can assert if sued individually on a *Bivens* claim. Even if successful, the plaintiff has difficulty proving substantial actual damages from the violation of a constitutional right,[23] and if damages can be proven, most Government employees do not have the financial resources to pay them.

Lastly, the present system of employee liability makes just as little sense from the Government's standpoint. Although employees acting within the scope of their employment are defended by Department of Justice attorneys, the Government often has to retain private attorneys when ethical considerations may preclude representation by Government attorneys. For example, it is inappropriate for a Department of Justice attorney to represent an employee whose conduct may be under criminal investigation, or when multiple defendant employees raise inconsistent defenses. In some cases, the best interests of the defendant require the raising of technical or substantive defenses which the Department is reluctant to raise or is combating in other unrelated litigation.

The Department's private counsel program is expensive. In spite of retaining attorneys at much less than the prevailing rate, the Department has spent over two million dollars since 1976. The program raises questions whether our taxpayers

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Mitchell violated plaintiffs' fourth amendment rights by authorizing an illegal wiretap on plaintiffs' telephones; each of the five plaintiffs were awarded $1.00); *Dellums* v. *Powell,* 566 F. 2d 167 (D.C. Cir. 1977), (Chiefs of U.S. Capitol and D.C. Police held liable for unlawfully disrupting a Congressman's speech at Capitol Building by wrongfully arresting and jailing the listeners; the amount of damages in this class action on behalf of 1,200 plaintiffs is still being litigated); *Tatum* v. *Morton,* 562 F. 2d 1279 (D.C. Cir. 1977), inspector of D.C. Police held personally liable for $500 damages for unlawfully disrupting 29 plaintiff demonstrators outside the White House).

[10] 28 U.S.C. 2680(h).

[11] See H.R. 2659, section 7.

[12] See, e.g., subsection 6110(i) of the Internal Revenue Code, 26 U.S.C. 6110(i); 5 U.S.C. 552a(g).

[13] 28 U.S.C. 2679(b).

[14] *Hohensee* v. *Carter,* No. 78-345 (M.D. Pa.)

[15] 46 U.S.C. 745.

[16] See e.g., *Seguin* v. *Hightower,* No. C-76-182-V, (W.D. Wash., Oct. 24, 1978).

[17] 26 U.S.C. 7426(d).

[18] See e.g., 38 U.S.C. 4116.

[19] 28 U.S.C. 1498.

[20] *Aetna Casualty & Insurance Co.* v. *United States,* 570 F. 2d 1197 (4th Cir. 1978).

[21] 28 U.S.C. 2680(h).

[22] *Norton* v. *United States,* 581 F. 2d 390 (4th Cir. 1978).

[23] In *Halperin* v. *Kissinger,* 434 F. Supp. 1193 (D.D.C. 1977), for example, after plaintiffs proved that they had been subjected to unlawful telephone wiretaps for a period of 21 months, they were awarded nominal damages of $1 each.

should be employing unsupervised attorneys to make legal arguments which are inconsistent with the legal policies of the government. Moreover, the presence of the individual employee and his private counsel makes the lawsuit difficult to settle.

These flaws in the current law of Government and employee liability would be removed by the enactment of H.R. 2659. Section one of the bill would make the Government the exclusive defendant in all common law tort actions in which the Attorney General certified that the employee was acting within the scope of his employment.

Section 3 would add a new section to the Tort Claims Act, making the United States liable for the torts of its employees caused by acts or omissions while acting within the scope of their office or employment, or under color thereof. If the Attorney General were to certify that the employee were acting solely under the color of his office and not within the scope of his employment, then the constitutional tort plaintiff could elect to proceed against individual employees instead of against the Government. A constitutional tort plaintiff successful against the government could recover attorneys fees and costs and could be entitled to either actual damages or liquidated damages computed at the rate of $100 a day or $1,000 whichever is higher, up to a maximum of $15,000. In most cases, the Government would be forbidden to assert the absolute or qualified immunity of its employees. All of the current exceptions to the Tort Claims Act, [24] such as discretionary acts and claims arising in a foreign country, would be inapplicable to constitutional torts.

All of the specific exclusive defendant provisions, now scattered throughout the United States Code, would be repealed by section 6 of the bill so that all employee immunity provisions would now be found in the Tort Claims Act.

Section 7 of the bill would amend the civil liability provision of the wiretap statute, 18 U.S.C. 2520, to exclude actions which would be brought under the amended Tort Claims Act. Our sensitivity to the fact that Congress has recently enacted several specific civil liability provisions [25] has caused us to limit any conforming amendments to the wiretap statute.

What may likely be the most innovative part of the bill is contained in section 8 which would create an employee discipline proceeding to replace the sanction against employee misconduct presumably lost by immunizing employees from civil liability. We propose that the victim of a constitutional tort be able to cause the initiation of an agency inquiry into the conduct of an offending employee by either accepting an award, compromise, or settlement on a constitutional tort claim, or by requesting such inquiry within 60 and 120 days after actually filing a lawsuit under the Tort Claims Act. A hearing would be required if there was a material and substantial dispute of fact which could be resolved with sufficient accuracy only by the introduction of reliable evidence in a hearing and if the decision of the agency were likely to depend on the resolution of such dispute. In his sole and unreviewable discretion, the agency may provide the complainant the opportunity to examine and cross-examine witnesses.

A Complainant who has actually recovered against the Government on the constitutional tort claim would have the right of administrative review of the discipline action to, in most cases, the Merit Systems Protection Board. Judicial Review could be taken to the appropriate United States Court of Appeals.

A former employee or former Presidential appointee who has been sued on a constitutional claim as an individual would have to agree to submit to the discipline procedure to have the Government substituted as the exclusive defendant. The discipline imposed could be a civil penalty not to exceed one-twelfth of the former employee or appointee's average annual salary at the time when the tort occurred. Current appointees of the President would be subject to a discipline proceeding by the body that performs administrative review of the agency's discipline proceedings (in most cases the Merit Systems Protection Board) which would then recommend appropriate disciplinary action to the President.

We believe that our discipline procedure is a much better accountability mechanism than the threat of civil liability that it is intended to replace. A civil suit focuses on the defendant's liability and the plaintiff's injury; a discipline proceeding can more appropriately limit its concerns to the conduct of the employee. A civil proceeding can only award monetary damages; an agency discipline proceeding can choose from a range of penalties, from reprimand to dismissal. Last, it has been suggested that the threat of a discipline proceeding provides just as effective a deterrent to unlawful conduct as the threat of possible civil suit.[26]

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[24] 28 U.S.C. 2680

[25] See note 12 supra.

[26] See Bermann, "Integrating Governmental and Officer Tort Liability," 77 Col. Law Review 1175, 1198 (1977).

Enactment of H.R. 2659 will benefit employees by removing the threat of an on-the-job decision resulting in a crippling lawsuit; it will benefit plaintiffs by increasing their opportunity for compensation for constitutional wrongs; but, most importantly, it will benefit the public in whose interest it is that Government employees do not shrink from their duties, that victims of Government misdeeds be indemnified, and that errant employees be disciplined.

Mr. DANIELSON. I have read your statement, but I would appreciate it if you would stress the highlights, and maybe we can have a dialog here on a couple of points I am not clear on.

Mr. CIVILETTI. That would be very desirable.

Essentially, our views with regard to the general principle of this substitution are to relieve Federal employees from direct apprehension and exposure to multitudinous suits against them under the guise of constitutional or other tort suits. Because the effectiveness of that remedy in the past, and for the foreseeable future, for the plaintiffs is practically nonexistent, the suit and the threat of suit become a harassment, become a vehicle by which some plaintiffs or groups are seeking legitimate relief, but relief against the Government, rather than against individuals—relief by changes in process or manner or by drawing attention to a potential abuse by past examples or past attacks.

And regardless of the legitimacy or illegitimacy of any particular suit—and there are many, many that are legitimate as to the employee or as to the employee group as a whole—it is worrisome, it is burdensome, it exposes employees to not only time away from their positions, but to substantial ridicule.

You and I, Mr. Chairman, can suggest strongly to each other and agree that since the risk of liability in these past suits is small, no one should worry about losing his home or his children's college education fund, or having his savings attached, because there won't be a judgment, or if there is a judgment against the individuals it will be small in amount. We could agree on that. But that is not so agreeable when yoy are in the shoes of the agent or the investigator or the Government employee, and when the numbers in those suits, in terms of dollar claims, are sometimes enormous—$3 and $4 and $5 million.

And I know it is a real day-to-day problem, because I have spoken to agents and investigators and officers and employees throughout the country on the occasions when I have been there on public business or for public speaking engagements, or for reviews of particular offices, and it is one of the first subjects of inquiry, of discussion, and of concern.

There are, I think—these figures may not be accurate, but the Attorney General, for instance, I think is a defendant himself in some 30 or more suits unrelated to suits in which he is perfectly properly the named defendant as the head of the Department of Justice.

The second major benefit or reason for supporting this legislation is that just as the existing law has been burdensome, troublesome, abusive, and a heavy weight on employees, it has been inadequate, hollow, and mythical as to the real relief to individuals in those rare instances where there have been tortious violations of a constitutional right It has proved to be an ineffective remedy for those victims.

Now, the number of instances is not great when we consider the scope and the breadth of the activity of the Federal Government. But they are sufficient to warrant giving a realistic remedy, to give realistic relief, to the victims, such as they may be, of such abuse or such violations. In those instances, even though it may not be an evil act by the employee, it serves the interest of the Govenrment that the victim of the act have some recourse and that that recourse be provided by the Government as a whole rather than by the individual.

I think, in this regard, in one of the pages of my written statement, I made reference to all the suits which have been filed since, I guess, 1971. There have been several thousand of them, I think—that is on pages 2 and 3—and only seven have resulted in any kind of judgment. And in those seven, despite the passage of now different years for each judgment, but in total 6 or 7 years, no judgments have been paid. And as an indication, the amounts of damages in the individual seven cases are specified in the footnote.

So I am suggesting that by this legislation we address those twin problems: The improper burden on the individual law enforcement and other Federal employee on the one hand, which ought to be shifted to the Federal Government; and, in turn, the conversion of what is now a hollow remedy for recognized wrong into a more realistic one, with provisions for liquidated damages and the elimination of the good faith defense, which now is available—and properly so, properly available—to the individual employee, because of the delicacy of the decisions in this fourth amendment area—and perhaps fifth amendment as a result of the Passman case.

Last, in highlight form, in considering this problem and this difficulty and this rather dramatic change in the law, one of the principal arguments—and I would suggest a symbolic argument—against it was that by relieving employees of potential liability, they somehow would be free to conduct themselves in a looser manner and there would be no deterrent, which is provided for these suits against misconduct. That was the major argument against the bill made by critics and people with whom we communicated over the long period of time that this has been formulated.

I say "symbolic" because, as I have mentioned before, with the limited number of judgments, seven out of several thousand, and with no one having been paid any substantial amount of moneys even in those judgments, it is not a very meaningful and positive deterrent. And if it is a burdensome harassment or worry then, in any event, it is the wrong deterrent, I suggest.

But the vast bulk and majority of Federal employees and law enforcement officers in Government are motivated by their character, by their training, by their service to their country, by their employment, by their advancement, by their respect in the community, by the satisfaction of jobs well done, and all kinds of other motivations. The result is that those motivations yield overall sterling conduct by the Federal agencies. They are also encouraged and influenced, of course, by detailed regulations, by administrative penalties which exist now, and discipline.

So to meet, in part, the critics' legitimate criticisms and concerns about the appearance of symbolism of a lack of deterrence as a result of transferring the remedy to the Federal Government, we

determined to utilize the same tools that are now in place and, by and large, working substantially well. We propose to strengthen them—to aid in making sure that Federal employees follow their duties to not only the letter of the law, but the entirety. And that is why we have provided the special support, the additional devices and opportunity for participation by the victims, in those circumstances where they have shown that they have a legitimate claim, to have a meaningful role in the disciplinary process without, I suggest, if looked at carefully—without disrupting and totally turning those administrative disciplinary proceedings on their heads.

But we think in the Justice Department and in these law enforcement agencies that we have balanced fairly the pros and cons in this area, the added or symbolic deterrents. We don't say this is the only way to balance them—that other people of good faith might not choose something different or might say this or that is not necessary.

Those things essentially are the highlights. There are other things which are of significance.

For example, as far as this transfer applies to people other than the executive employees, particularly judges and members of Congress and others, we thought it important that the immuities which apply to those officers be continued and be utilized by the Government, rather than providing, as is true with the other employees, that the good faith defense not pass through to the defendant. It is a more personalized defense for individual employees, whereas the immunities and privileges applying to the Congress and to the judiciary are truly institutional kinds of immunities and privileges, designed to insure that the particular important and special functions which they perform are preserved inviolate. So other considerations give way, and the sense of that is incorporated in the provisions, too.

I will be glad to discuss or try to discuss with you some of these other provisions, or answer any questions you may have, Mr. Chairman.

Mr. DANIELSON. Fine. Thank you very much. Your statement is excellent, is very well prepared, and I am going to recommend that all the members of the committee read it a time or two to have a better perception of what it is all about.

I have a couple of questions.

Picking up where you left off when you were talking about the scope of the bill, you include the judicial as well as the legislative personnel. We use the term employee throughout the bill. So that our record will be complete, what are the parameters of the word employee as you perceive it in this bill?

Mr. CIVILETTI. The parameters would be, I think, the same as the parameters under the existing Tort Claims Act and covered by the existing law. And it would cover all three branches of the Government as the Tort Claims Act now reaches.

Mr. DANIELSON. It would not, then, make a distinction which is common in our language between officer and employee? An officer would be considered to be an employee.

Mr. CIVILETTI. That's right, within the meaning of this provision, I'm fairly confident.

Mr. DANIELSON. I just want the record to be clear here. For example, the type of person who is nominated by the President and receives the advice and consent of the Senate would still be an employee?

Mr. CIVILETTI. Yes, for the purposes of this law.

Mr. DANIELSON. Within the meaning of our bill?

Mr. CIVILETTI. Yes.

Mr. DANIELSON. Thank you.

We use the term "color," and I know we are making a distinction from the word "scope." I am well aware of that. But I have a little concern that the term "color" may not be a precise word of art in the minds of may people. Would you comment on what you include within "color" here.

And I might add, if you don't have a fairly ready concept to give us, I would invite you to have some of your staff prepare a letter or memo. I think we are going to have to define "color" somewhere in the history of this legislation or we are going to have the courts defining it at a later stage, and we might as well make our own contribution.

Mr. CIVILETTI. I think that may be a very fine suggestion, because although "color of law," "color of office," "color of right," are phrases that are used and scattered throughout the law and various areas of law—for instance, the Hobbs Act in the criminal area uses "color of law," and "color of office," and the Bivens case itself talks in terms of "color or office"—they are used in slightly different ways and mean slightly different things.

What we mean by it is an act or action which is, under traditional analysis, outside the scope of the employment, but characteristics or purposes or instrumentalities of the office, of the Federal position, are used by the individual or group of individuals in the course of carrying out the act or acts.

For example, an off-duty investigator, clearly not within the scope of his authority, goes to an apartment dwelling to visit someone, and while in the dwelling, after having some drinks or whatever, knocks on the door of an unknown apartment. And the occupant comes to the door and says, "Who is it?" and he shows his credentials, his Federal credentials, and says, "I am here on official Government business. Let me in," and then goes in and commits some offense.

I think there has to be some argument that that conduct was under color of office—not within the law, that is, not within the direct scope of what his duties entail, and not in that area in which it is essential to perform in order to complete the duty, which is the scope kind of test, or even collateral to or in furtherance of his duty, but rather something in using his vehicle, in using his credentials, in using his office, in using his weapon, whatever, in a way by which a third party gets the clear impression that he is acting in an official capacity, whereas in fact and in law he is not, and he is only acting under the color of his office.

Mr. DANIELSON. That could apply, then, sir, not only in the constitutional tort law concept, but in the common law concept as well. The Government is the exclusive defendant in the case of common law torts committed in scope of employment.

Mr. CIVILETTI. Correct.

Mr. DANIELSON. But the Government is not the exclusive defendant in torts which are under color.

Probably a threshold issue sometime, in a court will be whether or not the action can be brought against the Government employee. If it is within the scope, the Government would be the exclusive defendant, but the plaintiff may seek to bring the action against the employee himself under the theory that it is only color. And that can be a controversy within itself.

Mr. CIVILETTI. Yes.

Mr. DANIELSON. So I do appreciate your comments. And I think this will come up more often in the so-called constitutional tort aspect, because I would not suppose that an employee can be within scope if his act is violative of the Constitution, because the Constitution could not authorize the employee to commit an act which violates the Constitution. At least, that is the concept I have.

Would you care to comment on that?

Mr. CIVILETTI. That is, I think, a general truth which we would all follow. I don't think it is precise in the legal sense, in that I think courts have determined that, although it may be within the general range of the scope of employment, there may be an instance in the course of conducing that employment which amount to a violation of a constitutional provision for which the Government shall be liable.

Now, whether they rationalize that on the basis of another theory or whether they simply say that it was collateral to the employment and therefore the Government shall be responsible to the same extent, I think there have been findings which permit recovery. At least they permit liability when there has been a constitutional violation, which seemingly would be beyond the scope but has been held to be within the scope because of the nature of the case.

Mr. DANIELSON. I think section 3 of the bill would, of course, clearly establish the Government's liability in a color situation.

Mr. CIVILETTI. That is correct.

Mr. DANIELSON. But I was thinking of how that would direct itself to the exclusivity of remedy which is provided for in section 1.

I know your comments will help here, since the Government is to be exclusive defendant on common law torts, but only jointly liable on those torts which are under color of authority.

Well, we will try to develop that, and I would appreciate it if you would get us a memo of some kind that we could include in our record, showing the defendant's concept of color. And, for your information, I think we had something like that in the last Congress, and I am going to ask counsel to rummage through our archives and see if we can't bring it up.

I thank you very much for your help, and I will yield to the gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. Attorney General, we are always delighted to have you.

On page 1 of your statement, in the third paragraph, or the last paragraph, you mention that:

> * * * with a few specific exceptions, the Government is liable for tort claims based on the negligent or wrongful act or omission of any Government employee while acting within the scope of his office or employment.

And then on the next page, the second sentence of the first paragraph—well, the second phrase—says:

* * * nothing in the basic Tort Claims Act prevents a plaintiff from bringing suit against the individual employee either directly or as a codefendant with the Government.

Under current law, if I am a truck driver driving a truck for the Government, I am a Government employee, and if I drive the truck negligently and injure someone in the course of my driving on duty, is the Government solely liable under that circumstance?

Mr. CIVILETTI. Yes; and because of a specific statute, not because of the basic Federal Tort Claims Act.

Mr. MAZZOLI. That was my question. Under the basic Tort Claims Act I would have, as an injured plaintiff, a specific option, but because of a specific exclusion, I can only proceed against the Government.

Mr. CIVILETTI. That is exactly right.

Mr. MAZZOLI. Does that explain the situation on page 4—I should really say on page 5—in which you show an inconsistency? You start on page 4 and continue on page 5 to show the inconsistency of this mish-mash of laws today. You say in some cases the driver can't be sued——

Mr. CIVILETTI. Yes.

Mr. MAZZOLI. And you show in No. 19 that Government flight controllers have been sued as individuals for damages arising from airplane disasters.

Mr. CIVILETTI. Yes.

Mr. MAZZOLI. Let me say it this way: Under the general Tort Claims Act, a plaintiff, say a passenger in an airplane which crashed, or his successors, could bring action because an exception has never been written in the law, such as the exception for drivers of vehicles——

Mr. CIVILETTI. That's right, and for those other peculiarities.

Mr. MAZZOLI. So if I understand it, not being very astute in this particular area, inconsistencies and confusions characterize the laws as they presently stand. And, if I understand correctly, one of the efforts being made today is to argue in behalf of changing the law to make it more simple, more understandable, more equitable. Is that one of the arguments on behalf of making changes as you suggested?

Mr. CIVILETTI. Yes.

Mr. MAZZOLI. Then, on page 7, the first full paragraph, it says section 1 is what the Justice Department would change so from here on there would be no opportunity for me to sue the flight controller, assuming this law would be passed.

Mr. CIVILETTI. And assuming the latter phrase of that paragraph, "that the employee was acting within the scope of his employment" was certified by the Attorney General.

Mr. MAZZOLI. Is there any way you can envision a flight controller not acting within the scope of his employment and causing an airplane crash?

Mr. CIVILETTI. Lots of ways, but I wouldn't want to speculate on them.

Mr. MAZZOLI. If you are working your shift and sitting in front of the console and there are all these wires——

Mr. CIVILETTI. Yes; in his formal 8-hour day or 10-hour day or whatever they are working, he is fully within the scope of his employment, I would think, from the time he enters the tower until he leaves.

Mr. MAZZOLI. But if the traffic controller was off duty and somehow got himself on the premises——

Mr. CIVILETTI. If he got into a conspiracy or extortion or terrorism I can see that, but that would be a criminal action.

Mr. MAZZOLI. Section 3 deals with constitutional torts as distinguished from civil law.

Mr. CIVILETTI. That's right.

Mr. MAZZOLI. As to constitutional torts, the Attorney General has to make a certification. In any event the certification has to be made, I assume; is that correct?

Mr. CIVILETTI. Yes.

Mr. MAZZOLI. There are two options in making the certification: Either the person was acting within the scope of his employment, or under the color of his office. If the Attorney General certifies that the employee is acting solely under the color of his office and not within the scope of his employment, then the plaintiff can proceed against the individual Government employee or against the Government; is that correct?

Mr. CIVILETTI. Correct.

Mr. MAZZOLI. If you or the Attorney General make a finding, however, that the act of negligence was caused by someone acting within the scope of office or employment and, of course, under the color, then the only option I have is to go against the Government; is that correct?

Mr. CIVILETTI. If it is within the scope, color wouldn't have to enter in. It would just be a certification that it was within the scope of the employment, and in that instance the remedy for the liability would switch to the Government.

Mr. DANIELSON. The time of the gentleman has expired. I am going to try to budget time.

Mr. MAZZOLI. This is very helpful, because this is a very complicated subject matter.

Mr. DANIELSON. I understand.

I will yield to the gentleman from Ohio, Mr. Kindness, who, I believe, was the first to arrive.

Mr. KINDNESS. Thank you, Mr. Chairman, and Mr. Civiletti. I appreciate your testimony this morning and apologize for having been distracted by some other somewhat partisan business that kept us, on this side of the aisle, away for a bit.

I would like to ask whether the Justice Department has done currently, or at any time, an estimate of what sort of dollars are involved in the liabilities that might be encompassed under the coverage of legislation such as this? At the same time, I might encourage your comment with respect to the Supreme Court's very recent decision in *Davis* v. *Passman,* which expands the scope of the constitutional torts to include violations of the fifth amendment, the due process clause, which I assume would enlarge that estimate in some degree.

I would appreciate your comment in that area.

Mr. CIVILETTI. We had the Office of Managment and Finance take a look at the cost estimates, if possible, with regard to projected cost and expense, including payments for damages and the rest. They didn't come up with anything very satisfactory.

We paid out in actual expenditures over the last 4 years, in counsel fees, I guess, somewhere between approximately $400,000 and $750,000 per year for representation of employees who were acting within the scope of their employment and who were sued because of differences in defenses or differences among the defendants and the Government. We have had to engage private counsel for those. So on that alone, we would save that amount of money, or at least we wouldn't have to expend it.

Mr. KINDNESS. Are you considering what additional personnel might be required in the Justice Department to offset this?

Mr. CIVILETTI. We don't think any, because in may of these suits the Government is a party and we are participating in the depositions, and so on. So we don't think there would be a substantial increase in the number of lawyers.

Mr. DANIELSON. Will the gentleman yield for a moment?

Mr. KINDNESS. Yes.

Mr. DANIELSON. We have a memorandum dated May 7, 1979, from Patricia Wald, which sets forth the cost estimate for the proposed amendment of the Federal Tort Claims Act as of the end of March 1979. It sets forth a good deal of data relating to the gentleman's question.

Mr. KINDNESS. May 7?

Mr. DANIELSON. Yes, if you do not have a copy, I assure you we will get one, and I would ask unanimous consent for it to appear in the record at this point.

Mr. KINDNESS. Fine.

Mr. DANIELSON. Is there any objection? [No response.]

Hearing none, it is so ordered.

[Information furnished by Ms. Wald follows:]

[Memorandum]

MAY 7, 1979.

To: Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs.
From: Kevin D. Rooney, Assistant Attorney General for Administration.
Subject: Cost estimate for the proposed amendments to the Federal Tort Claims Act.

Strictly speaking, enactment of the proposed Federal Tort Claims Act (FTCA) amendments will, *initially,* save the *Department* money since the cost of private counsel fees will be eliminated. However, such a limited stance sidesteps the possibly larger cost to the Government, i.e., the ultimate costs associated with settlements and judgments arising from enactment of the amendments. Accordingly, we have interpreted your request for a cost estimate to mean the all-inclusive cost.

Unfortunately, as with some other legislative proposals, it is virtually impossible for the Department of Justice to estimate the *costs* of the proposed FTCA amendments. We cannot predict, for example, whether and to what extent the prospect of federal liability will encourage claims; neither have we, at present, the means to determine exactly how much of the current caseload will be affected by the change. We might add that even if such preliminary data and calculations were available, external events (most notably the outcome of the *Davis* v. *Passman* case presently in the Supreme Court) stand to profoundly affect the ultimate cost to the Government. Therefore, rather than render an estimate and risk exposing the Department to such after-the-fact criticism as attended the Swine Flue or Speedy Trail Act projections, we think it would be more helpful to enumerate several factors which we can reasonably expect to affect the cost to the Government should the amendments be enacted.

I. *Elimination of need for private counsel fees*

As mentioned earlier, enactment of the amendments will result in a net savings in this area. Listed are the actual expenditures for the past four years: fiscal year 1976—$554,306; fiscal year 1977—$448,520; fiscal year 1978—$757,248; fiscal year 1979—$371,119 (as of March 21, 1979).

Conversely, however, the approximately 15 cases presently being handled by private counsel would revert to the Civil Division for handling within the Department. It is likely that the Civil Division would then extend immediate settlement offers of up to $1,000 per alleged violation in a limited number of these cases.

II. *Effect on present Department caseload*

This calculation is particularly difficult to derive since (1) the constitutional tort cases affected by the amendments are presently spread among the U.S. Attorneys, the Civil Division, the Criminal Division and the Tax Division, and (2) we have little reliable data concerning the amount or nature of attorney time devoted to such cases. It can be assumed however, that considerably less time would be expended on discovery. As a result, we can safely assume that a net savings of attorney time will result given the present Department caseload.[1]

Listed below are estimates of present caseload and average attorney time per case type for each of the affected divisions and the U.S. Attorneys.

Tax Division.—The Tax Division itself—as opposed to the U.S. Attorneys—handles almost all tort suits filed against IRS agents. At present, the Division handles 75–80 such Bivens-type cases a year. The average amount of attorney time expended is 11 workdays per case; most of that time—70 percent—is devoted to discovery. Tort suits handled by the Tax Division are often filed as a stall tactic by the private bar and frequently comprise only a part of a larger civil fraud or criminal tax case.

Criminal Division.—The Criminal Division handles prison inmate litigation in its General Litigation and Legal Advice Section. It seems that virtually all prisoner suits, in addition to alleging improper medical treatment, bad food, etc., involve damage claims. While the damage claims usually comprise a less significant aspect of the average case, they would merit coverage by the FTCA amendments. Currently, the Criminal Division handles approximately 200 such cases yearly, half of which consume 8 attorney workdays per case and half of which consume merely ¾ of an attorney workday.

Civil Division.—Current cases potentially affected by the FTCA amendments can be found in both the Torts and Federal Programs Branches of the Civil Division: 20 prisoner damage claims cases averaging 3 attorney workdays; 10 representation of Government employee cases (primary) averaging 30 attorney workdays; 110 representation of Government employee cases (supervised) averaging 3 attorney workdays; 5 FTCA cases averaging 165 attorney workdays; 40 individual liability cases (primary) averaging 79 attorney workdays; 170 individual liability cases (supervised) averaging 3 attorney workdays.

U.S. Attorneys.—Since the U.S. Attorneys do not keep such discrete caseload data, estimates had to be derived largely from Division sources. Generally, U.S. Attorneys are charged with handling the less complex constitutional tort cases and, accordingly, less attorney time is expended per case: 600 prison inmate relief and damage claim cases (handled in conjunction with Criminal Division) averaging 1.5 attorney workdays; 140 prisoner damage claim cases averaging 2 attorney workdays; 170 individual liability cases (shared) averaging 25 attorney workdays.

In sum, approximately 1,540 cases a years involving 12,045 attorney workdays would be affected by enactment of the FTCA amendments given present caseload levels. Not included in these calculations, thus far, is any allowance for division appellate work on applicable cases, administrative overhead[2], nor attendant secre-

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[1] Major discovery savings would also accrue to the agencies and departments employing those individuals who have been sued. Currently, the burden on an agency can be immense. The FBI, for example, has had to examine hundreds of thousands of documents in connection with suits against individuals. In addition to the savings associated with the discovery process, simplification of the issues involved in a constitutional tort action will reduce the amount of attorney time necessary for each case.

[2] For example, to gain representation an employee sued individually must request that his agency recommend to the Department of Justice that he be provided legal representation. Many of these requests are routinely handled. In a significant number of cases, however, the decision whether to extend representation must be made, by at least with respect to those cases handled by the Civil Division, by the Assistant Attorney General, who is guided by a committee comprised of four attorneys including a Deputy Assistant Attorney General. The committee meets for several hours at least once a week and more frequent meetings are often required. In those cases where private counsel are retained, it is necessary to enter into contracts with the firms, review the bills which are submitted to us for payment, and decide whether payment of

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tarial workdays. Roughly half again as many secretarial workdays would be consumed (i.e., 6,023). Assuming that the average Division attorney is a GS-13, step 5, and the average secretary is a GS-6, step 5, and the cost of carrying each employee (travel, equipment, etc.) is approximately $13,000 per attorney and $6,000 per secretary, we can extrapolate that the approximate personnel-related costs of handling cases immediately affected by the proposed amendments is in the neighborhood of $2,821,530 annually. Conceivably, by substantially reducing the discovery process, the legal divisions alone could save as much as $1,000,000 a year.

III. *Probability of upsurge in cases given federal liability*

It is generally agreed that a sizable upsurge in case filings would follow enactment of the amendments since financial redress would be possible in all instances. The extent of this upsurge, however, is incalculable.

IV. *Judgments*

At present, we cannot calculate how much has been awarded in those relevant tort cases which the Government has already defended, therefore it is difficult to make any projections.

Financial liability of the U.S. Government would be little affected in areas involving common law torts since, under statute, successful plaintiffs already collect judgments from the Government whenever the U.S. Government is a defendant either alone or jointly with an individual employee. Accordingly, extending the FTCA to areas of common law is not expected to have a significant financial impact. However, the FTCA amendments will clearly affect the liability of the United States in cases involving constitutional tort claims. The extent of liability however, is difficult to assess. Over the years, thousands of such cases have been filed, but only eight have ever resulted in favorable judgments for the plaintiff. Of these eight cases, no money has yet been paid since appeal is still either pending or contemplated. It should be noted though, that the amendments provide for class actions wherein no one class can receive more than a million dollars in liquidated damages but class members would still be entitled to any actual damages. For these reasons, we cannot begin to estimate the ultimate costs in judgments.

V. *Effect of the "Davis" v. "Passman" case*

The extent of the liability of a federal employee for alleged constitutional abuses is unclear. An employee currently can be held liable only if he commits a constitutional tort within the meaning of the *Bivens* decision and its progeny. Although some circuits have recognized constitutional torts for violations of the First, Fifth, Sixth, Eighth, and Ninth, Thirteenth, and Fourteenth Amendments, other circuits have refused to extend *Bivens* beyond its facts, limiting its scope to violations of the Fourth Amendment. The scope of *Bivens* may be settled by the Supreme Court this term when it considers *Davis* v. *Passman*, 571 F.2d 793 (5th Cir.) (en banc), *cert. granted* U.S. (1978). In those circuits and districts were *Bivens* has been limited, many plaintiffs have undoubtedly not brought lawsuits which they might otherwise have brought. Even in those circuits where *Bivens* has been read broadly, few plaintiffs have actually recovered any damages, further discouraging potential plaintiffs from filing suit. If the Supreme Court, in *Davis* v. *Passman*, expands or faciliates use of the *Bivens* remedy, the Department of Justice may be faced with defending a flood of new claims.

Mr. DANIELSON. I thank the gentleman for yielding.

Mr. KINDNESS. I thank the chairman for the elucidation.

The question then becomes whether there has been any attempt at all to consider what the expansion of liability might hurt in the event such legislation as this were to be enacted. Do you have any comments in that area?

I realize the difficulties of approaching the subject, but would it be fair to state that it is clear that there will be some expansion of liability?

Mr. CIVILETTI. I think that there will probably be more suits, perhaps, but not an overwhelming number of additional suits. Be-

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some items should be refused. This process requires about 30 percent of the time of one of the Special Assistants to the Assistant Attorney General, substantial time by staff attorneys familiar with the details of each case, and necessary secretarial support. Those costs are not included in these estimates.

cause I think even with the elimination of the good faith defense and even with a transfer to the deep pockets, so to speak, and with the liquidated damages available, it is still a difficult suit; it is still a rare instance by comparison to lots of automobile accident cases, for example, or drunk driving cases, or many other cases. It dims by comparison.

So I don't see the specter of a monster released here at all. And at the same time, these suits have proliferated by themselves under the present law since 1971 to a certain extent, and I would think that they would likely increase to some extent under the developing law and the extensions in the very case you mentioned, *Davis* v. *Passman.*

Mr. KINDNESS. If the good faith defense were not to be waived as proposed in this legislation, would it be fair to state that there would be a considerable limitation on that increase in liability?

Mr. CIVILETTI. I don't think it would really affect the numbers of suits. And, of course, I don't think it would affect the workload of the Government attorneys.

It certainly has an effect. It is a much tougher case with the good faith defense in than it is without it. So yes, in those instances it will increase the number of successful claims. And it is admittedly intended to do that where there has been proof of liability, of a wrongful act, of a violation of constitutional rights.

And we are not talking about the difficulty faced by an individual in the toughness of his decision. It is felt that the victim of that violation ought not to bear the consequences of discretion to the individual, but ought to have his remedy against not the individual but the Government. And that is the theory and the belief and the attitude with regard to it.

Mr. KINDNESS. So I can understand the answer to the question. I was trying to determine whether it was your opinion or the position of the Justice Department that waiving the good faith defense would increase the potential cost of this legislation. And, if that provision were not included in the legislation, whether that would decrease the amount of potential liability.

Is that a correct understanding?

Mr. CIVILETTI. Yes, to the first proposition. The answer to the first proposition is yes, and it will increase to a certain extent the cost of Government liability. And by retaining it, by passing that defense through, it would decrease it.

Mr. KINDNESS. Thank you.

Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you.

Mr. Hughes of New Jersey.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. Civiletti, I appreciate your testimony and I notice you have a tremendous backup team today. I have never seen our former colleague look so comfortable as he does today.

Mr. CIVILETTI. I should have started by thinking you for giving him up, and we are delighted to have him in the Justice Department.

Mr. DANIELSON. If the gentleman will yield, I will not look kindly on any further proselyting. [Laughter.]

Mr. HUGHES. I think that what the legislation endeavors to do in terms of trying to bring about some degree of simplicity is admirable. I suspect, however, the focus of the criticism is going to be on whether we are actually going to deter wrongdoing. I suppose the question is whether we have enough by way of disciplines in the legislation to discourage public employees from acts of wrongdoing. That will undoubtedly be the focus of the critics.

I have a couple of questions along this line. First, having some 10 years of experience in the law enforcement field myself, if you take a whole agency, not just a couple of police officers—and in the legislation we suggest that the agency head will be responsible for conducting disciplinary proceedings—do you think, under the circumstances, that that is the appropriate mechanism for determining whether or not a member of their department is guilty of wrongdoing?

Do you think an agency head who has to be concerned about morale, for instance, who has to relate to the problems that police officers, investigators, and others within the agency have responsibility for—do you think that under those circumstances we are achieving the best for the public good by having that agency head make the determination as to whether or not there has been wrongdoing?

Mr. CIVILETTI. I think so. That question raises the traditional question about independence of disciplinary bodies or citizen participation on those bodies in the police forces particularly, and the State police departments, and also in other law enforcement groups, and even among members of the bar. It is a raging subject now in the bar discliplinary panels in some States. And it is a classic kind of argument one way or the other.

I think in the Federal system and the major Federal agencies, and Federal law enforcement agencies particularly, the wisest course—all the advantages and disadvantages considered—is to leave that power in the Director of the FBI and the head of the Secret Service, and if you pick the kind of men that are now in those positions and they are approved for their terms, I will put my faith in them.

Mr. HUGHES. What you are saying, in essence, is that you believe that that is proper, although that does give you some difficulty. Is that it?

Mr. CIVILETTI. In this instance it does not give me difficulty, although I recognize the value of the arguments in the classic proposition. Gratuitously, I am in favor of participation in attorney policy boards and grievance matters.

Mr. HUGHES. Let me move on to another question, as my time is about to expire.

I notice that in the administrative inquiries section generally—and I haven't really had time to study it word for word—it indicates that inquiries may be initiated after a claim has been filed but there is an effort to compromise or settle, or in the event of a judgment. Then, in subsection (c) it says that an inquiry may be made by the agency itself.

I am concerned about a number of different barriers. For instance, suppose a claim is filed that has substantive merit but on a

technicality is it dismissed. Why, under those circumstances, shouldn't an inquiry be triggered?

Or suppose a claim is filed but not pursued because an individual doesn't want to testify. That happens often. The person may be elderly, or for other reasons decides he doesn't want to pursue it. Why, under those circumstances, should a disciplinary proceeding be initiated, even though perhaps there is no reward?

Mr. CIVILETTI. No. 1, these rights and these added safeguards, this muscle provided for by the changes in this law, are merely auxiliary to disciplinary proceedings generally. For example, in the Justice Department, the duty of the Office of Professional Responsibility is, in fact, to go about its responsibilities in every case, regardless of whether it amounts to a suit or not, regardless of whether or not there is a judgment. And the same is true in the FBI, a review process back and forth. So that for any significant allegation of wrongdoing there is a substantial investigation or inquiry right now.

Mr. HUGHES. Before my colleague gavels me down, you are suggesting it is auxiliary, but the legislation doesn't suggest that. And if it doesn't suggest it, is it perhaps going to be argued somewhere along the line that since it is not spelled out, that this is the only remedy?

Mr. CIVILETTI. No; the provisions with regard to disciplinary proceedings are all very well spelled out in the Federal Register. To the extent they are affected, the statute deals with that. Where they are not affected, they stay in place.

Mr. HUGHES. Thank you.

Mr. DANIELSON. Thank you, Mr. Hughes.

Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman. I am very pleased to have the Deputy Attorney General here with us today, and I want to join in welcoming the new Assistant Attorney General for Legislative Affairs.

Mr. CIVILETTI. Thank you, Mr. McClory.

Mr. MCCLORY. I am wondering why in this legislation we need a minimum of $1,000. Do we just assume that every tortious act has got a minimum price tag on it of $1,000? It seems to me that there could be a tort in which there would be virtually nominal damages. That there was a wrong done, but nobody suffered monetary damages or actual damages, and it is just kind of a token expression of wrongdoing.

What do you think about that?

Mr. CIVILETTI. It's a hard question. I can't argue that $1,000 is perfect or it ought not to be $500 to make it significant. I think there is something wrong when there is a constitutional violation when liability is found and the significance attached to that, simply because of the failure of proof of direct damages, is found to be $1 or $5. I think something is wrong with that. There is not enough significance given to the Constitution in that kind of a result.

This is intended in part to raise the level of sensitivity and appreciation and honor for the Constitution generally, but more particularly to give it significance—not overwhelming and not making it high enough for people to bring suits to strive for the

monetary reward of it. But after they have gone to court, testified, had the cost of their transportation, time off from work, and whatever, it was thought that $1,000 was approximately right.

But I can't quarrel with some other person of good will thinking that it is not the right figure.

Mr. McCLORY. It's sort of a fine or penalty, though, that the Government is paying.

Mr. CIVILETTI. No, I think it is more compensation.

Mr. McCLORY. Now, something else that I am concerned about is the time for the filing and prosecution of the trial or disciplinary proceedings against the wrongdoer employee. There is a right, as I see it, in H.R. 2683 for an action to be brought after a judgment is entered, and that might be at some later time. I wonder if that doesn't prejudice the individual who is charged with a wrongdoing as far as making up his own defense is concerned. If there is a charge on behalf of someone that there has been tortious wrongdoing and they want to file a claim, if they intend to desire some disciplinary action against the person, why should they not be required to do it at or about the same time?

Mr. CIVILETTI. Well, that again, I think, was on a judgment basis, that if you allowed people at the time they filed the suit to have a strong participatory role in discipline, you were perhaps opening that disciplinary process too widely to people who had perhaps meritless claims, and therefore you were securing judgment or providing for the condition precedent in order to make sure that the participation was only in those instances where people had proven or shown or where the Government had admitted that there was really a legitimate, compensable claim, and not simply the filing.

And that would reduce the numbers of such participation clearly, and retain the integrity of the disciplinary proceeding.

But more importantly than that, of course, it may well be that in those instances and with that amount of time—not only the filing of the claim but either a settlement, or a judgment, or whatever else—a disciplinary process may already have occurred. Punishment may well have been meted out, and the persons who would otherwise want to initiate disciplinary action will be well satisfied with what has already occurred.

Mr. McCLORY. Well, that may be; I am not arguing with that. But I can see that it would be highly prejudicial to the respondent employee.

Mr. CIVILETTI. It could be; you're right, Congressman, it could be. But that is true at the same time when allegations come up 5 years later or 7 years later as to the conduct of an employee. It doesn't matter who brings them up.

Mr. McCLORY. Let me ask one more question. This definition of a person who is injured or damaged and files a claim is so broad it could involve even a foreign agent. What about the case of an FBI agent or CIA agent or other person involved in intelligence, for instance, who engages in some kind of tortious conduct relating to a KGB agent or suspect.

It seems to me unless we limit the definition of "person" to citizens or individuals with the right to a permanent residence

here that we could be opening up the opportunity for foreigners to file claims for damages.

Mr. CIVILETTI. There is no intention for any foreign agent to be able to claim any damages against the United States here in any way.

We are concerned, though, with our proper policy in regard to immigration and our great history of immigration, that it not be just citizens, that the rights be bestowed not just on citizens, because we think that this protection is necessary, and the relationship between aliens, for example, and law enforcement authorities or government is very strong, and that they have certain rights as human beings, and if they are lawfully in this country they ought to be protected under the Constitution.

Mr. DANIELSON. The gentleman's time has expired.

Mr. Moorhead of California.

Mr. MOORHEAD. I have a concern in relationship to the waiver of good faith. If you are going to waive the good faith requirement and yet are going to pay a minimum of $1,000 or $100 a day for what might be a continuing series of constitutional torts that took place in good faith, you might get a substantial judgment against the Federal Government, where there was actually no damage at all.

Don't you think there ought to be some difference one way or the other in statutes so you don't get that kind of situation?

Mr. CIVILETTI. I think there is an attempt at that by capping the amount of damages at $15,000, I think, for the continuing violation—no more than that.

Mr. MOORHEAD. Well, to that extent it's a gift.

Mr. CIVILETTI. No, I don't think it's a gift. It is a circumstance. And I was about to say that in a number of these instances, historically in claims and also in our own experience, they are one-time events. There may be a telephone tap, there may be a wrongful search, there may be an entry, a surreptitious entry, or whatever. Occasionally it is more than one day, but it most frequently is a one-day or one-occasion occurrence. That is No. 1.

No. 2, the good faith defense doesn't mean that the conduct is not regrettable, terribly negligent, that everyone doesn't feel awful remorse about it, and there hasn't been real harm or substantial harm, if not physically, to money values or at least to the dignity of the individual and the privacy of the individual.

I will give you a quick example. Investigators, three of them, go to a home of suspects looking for racketeering—numbers, or whatever. When they go in the home and they are queried about it later, each one says he thought the other had a search warrant. None of them had a search warrant.

They find a man and woman 75 years old in there. They take the woman and strip the woman down and do cavity searches and whatever—in the wrong home.

That is not a gift when you are talking about compensation for that kind of wrong under the fourth amendment.

Mr. MOORHEAD. In a case like that there would be psychological damages.

Mr. CIVILETTI. It is difficult; difficult. And that happens to be an actual case, for example, in which the damages awarded from a jury were $1.

But I don't think it's a gift. I think you have a point; I think it is a good point. We are not in this business and this law is not intended to be a giveaway. It is not intended to provide a pocketful of money and a pot of gold at the end of any rainbows. This law is limited, restricted on the amount of damages.

In most cases they will not be compensatory damages for physical injury. People are not going to be shot or beat up in this kind of thing. It doesn't happen any more—I hope; I pray to God.

But you are correct. We are concerned about that. We have tried to deal with it by the fixed amount and by the limitations, but we are not perfect and that is why the good wisdom of the Constitution is that the Congress looks at it hard.

Mr. MOORHEAD. Well, there is a serious problem with legislation if you go beyond relieving the Government employee of his liability and award damages and judgements beyond that which he would have been liable for. You have a good point. But there can be constitutional torts, where there is no actual damage. I also think there has to be allowance for the normal defenses that any individual would have, or else you are going to be subjected to a tremendous amount of litigation.

I have another point I wanted to bring up here. I am concerned with the rights of the Government employee. I think this bill as it is presently written tramples on those rights.

Last year in the legislation we put in an amendment that guaranteed the right to counsel for employees in disciplinary proceedings. I see in the new legislation that has been introduced there is no guarantee of that right. That amendment has been left out. The amendment last year said:

> In the case of any inquiry or hearing, conducted with respect to such an administrative investigation or disciplinary action, the employee whose conduct is the subject of the inquiry or hearing shall be entitled to be accompanied, represented, and advised by counsel. Nothing in this chapter shall affect the availability of defenses, including good faith, which an employee may raise in an administrative investigation or disciplinary action that are otherwise available.

Why shouldn't the employee's rights be protected to that extent, his constitutional rights?

Mr. CIVILETTI. Why shouldn't they?

Mr. MOORHEAD. Yes.

Mr. CIVILETTI. It is a question of fairness, essentially, and a question of whether you give the employee so many rights that he is impervious to discipline.

Mr. MOORHEAD. But a right to counsel isn't something that is frivolous.

Mr. CIVILETTI. I didn't say frivolous. I didn't say any of them are frivolous. I said the question was whether you give him or her so many rights that they are impervious to discipline and thereby there is no deterrent from abuse in the disciplinary process, or whether you go the other way and you limit their rights so gravely that they are treated unfairly, and subjected to unfair proceedings instigated by or pursued by third-party citizens of one kind or another, and it is a question of balance.

Now, there is a special question dealing with Federal employees and in particular Federal enforcement investigators in the over 110 units which in some manner or form provide that kind of service and duty, because ordinarily in their disciplinary proceedings, until they get to a very high level, the employee has no right of counsel. That is part of what you give up when you become a law enforcement officer or a CIA agent or whatever.

Mr. MOORHEAD. You have brought another factor into this thing. You are allowing the claimed victim, presumably through his counsel, to initiate this disciplinary action. There is going to be counsel on that side, you can be sure. And yet you are bringing the public employee, who probably isn't a highly paid employee and you are putting him in a position where a plaintiff victim, maybe years after the constitutional tort, has initiated a proceeding before a disciplinary board. And, yet, are we giving him no guarantee of counsel at that point.

Mr. CIVILETTI. That is perhaps slightly different in degree, but it can happen today. Five years ago, someone, X, committed a tort. It is not reported or alleged until today. And it is alleged and complained about by the victim of the tort. A panel begins, disciplinary process occurs. He doesn't have a right to counsel or whatever.

The only difference in this bill is the addition of the formal matter of the counsel for the instigator. But the same risk is undergone.

And I am not suggesting, either, Congressman, that as to this type of proceeding it would be calamitous to have, at some stage in the process, the accused have the right to counsel at all. It doesn't offend me.

Mr. MOORHEAD. Would you object to an amendment that would give him that right?

Mr. CIVILETTI. I would have to consider and talk to, as I have done throughout this, people like Bill Webster, the head of the FBI, and Stu Knight, the head of the Secret Service, to see how it would tie their hands or triple the time of their disciplinary proceedings to have the accused have the right to counsel in every case—whether they would be able to run a safe and sound and effective force with that kind of a provision, before I could give an answer. And I can't give it off the top of my head.

Mr. MOORHEAD. I know it is a serious thing, and I know Attorney General Bell is concerned with it also, but we are constantly making it more difficult for a Federal employee to get along. We are taking one right after another away from him these days, and we are bending over backward to make sure that he is restrained in what he does.

Not long ago we were considering the ethics bill, which also made Federal employment less attractive.

Mr. CIVILETTI. Well, Congressman, if you measure the attitude of the men and women in the field—now, I don't have an exact poll, but my assessment of the people with whom I have met and talked, and many, many of them in groups of 20 to 500, particularly in the Justice Department field forces and particularly within those groups of law enforcement forces, is that if you give them the choice they will take the change of liability, the removal of the threat, even though it is not realized, the threat to their assets,

their possessions, their future and their children's future, and their homes, and all the rest every time rather than having the law as it is.

If you ask: "Would you rather have the law as it is, and disciplinary action as it is, or would you rather beef up disciplinary action and have a change in the law?" they will take this bill every time.

Mr. MOORHEAD. I agree they would like to get that off their backs, and maybe justifiably so. I am not opposed to that point. But is it necessary to initiate a system where somebody who may be vengeful would be able to initiate this kind of proceeding?

They have already gone to court with their civil suit. Shouldn't the judgment of the Attorney General's office or the judgment of the employer department be sufficient to protect society in these disciplinary actions? Or should an outsider be able to come in and continue proceedings that keep dragging on for years with appeals and so on?

Who is going to pay the cost of that counsel for the individual during those proceedings that may drag on?

Mr. CIVILETTI. The individual.

Mr. MOORHEAD. The individual working for the Government?

Mr. CIVILETTI. No; I thought you were asking about the victim or the person who's got a judgment that there is a constitutional violation. And that ought to be a fairly narrow class when you get to that stage, as opposed to these suit initiators, which may be a wider class. After they have received fair recognition or fair remedy and feel strongly enough about it or the continuing problem that they want to go to the agency with their counsel, it is my recollection that they go at their own expense.

[Discussion off the record.]

Mr. CIVILETTI. That is correct.

Mr. MOORHEAD. But the plaintiff victim at the same time is able to get attorney fees for the action involved. They will be able to get attorney fees and they will be protected in that respect.

And under the class action suits that are authorized to be brought under this kind of action, there is a real benefit to the lawyers who want to make a living off this kind of thing.

My point is that the person who works for the Government is left, to a certain extent, bare. I don't think it is a fair balance that we are striking in that respect.

Mr. CIVILETTI. It might appear that way or you might reach that assessment. If you gave me my choice as to whether I was going to represent the Government employees in a substantial amount of this practice, or the Government, or whether I was going to represent the claimants, and which would have the most successful cases and which side would win the most cases, and who would get a decent amount of money, I'd take the Government employees' cases every time without question.

So I don't think we are talking about a circumstance where the poor Government employee is standing bare.

Mr. MOORHEAD. Well, I don't represent a large number of Government employees, but I am concerned about everybody's constitutional rights, including theirs.

Mr. CIVILETTI. Surely.

Mr. MOORHEAD. The last question I wanted to bring up—we touched on it before—on page 8 of the bill, under the constitutional tort section, section (b), it says:

> The United States may not assert as a defense to a tort claim arising under the Constitution of the United States, the absolute or qualified immunity of the employee whose act or omission give rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct, except that the United States may assert such a defense if the act or omission is that of a Member of Congress, a judge, or prosecutor, or a person performing analogous functions.

But on page 24 of the bill, under "Miscellaneous," we say that:

> Nothing in sections 2683 through 2687 of this title—

That did not include the section that I just recently read—

> shall affect the availabilty of defenses which an employee may raise in any administrative or judicial proceeding.

I understand there are situations in which an employee can still be sued, and the question is: Can his good faith be raised as a defense for him?

Mr. CIVILETTI. Sure.

Mr. MOORHEAD. But it isn't spelled out well enough, I don't think.

Mr. CIVILETTI. The answer to that question is yes. If you would like, Congressman, I will be delighted to submit an analysis that shows that, and then if that "yes" answer needs to be strengthened, in your judgment, we would strengthen it.

Mr. MOORHEAD. Why did we use 2681 instead of 2683 through 2687?

Mr. CIVILETTI. Because I think 2681 probably has nothing to do with the administrative or the disciplinary proceeding whatsoever.

Mr. MOORHEAD. That is because the United States——

Mr. CIVILETTI. In the tort cases only.

Mr. MOORHEAD. All I am concerned with is——

Mr. CIVILETTI. That is be clear?

Mr. MOORHEAD [continuing]. That the court or the administrative body may say, "Well, the intent of Congress is clearly stated in one section, and we are going to assume that they meant the same thing to apply here."

Those things do happen.

Mr. CIVILETTI. Oh, yes, they do happen, and we don't want them to happen here, because those defenses in the more individualized context of administrative proceedings and disciplinary proceedings are available to the defendant and not taken away from the Government employee.

Mr. MOORHEAD. Please spell that out in some way.

Mr. CIVILETTI. All right. And I will submit to you how we think it is already done, and if it is not satisfactory we will work to improve it.

Mr. MOORHEAD. There were a number of other points I wanted to raise with you, but the chairman has his gavel up. But I think this is a most important piece of legislation. I think it has the seed of a good idea behind it, but there are lots of problems with it as it is now drafted. I do hope we don't do something we shouldn't.

Mr. DANIELSON. The time of the gentleman has expired. We are going to have a markup session, and I hope the gentleman will prepare his contentions for that.

The gentleman from Ohio.

Mr. KINDNESS. I want to be sure I understood something that occurred in the questioning by the gentleman from California, Mr. Moorhead.

In pointing out that the legislation in the last Congress did afford the right to counsel to the Government employee in an administrative proceeding, that is, the disciplinary proceeding, and pointing out that it was not in the legislation as proposed this year, I understood you to indicate that you couldn't give an answer offhand as to what the position of the Department would be with respect to reinstating that kind of language providing for counsel.

Is that correct?

Mr. CIVILETTI. That is correct, because I wanted to communicate with people and understand fully how a provision with regard to counsel for the employee would affect general diciplinary proceedings and the management authority now in the hands of the Director of the FBI and the head of the Secret Service and other agencies.

Mr. KINDNESS. And the Justice Department did put in quite a bit of work on formulating the ideas that are in this bill this year?

Mr. CIVILETTI. Yes.

Mr. KINDNESS. And are you telling us you left that out without talking to those people about that?

Mr. CIVILETTI. No; I am saying I personally did not talk with those people about advising a change which would provide counsel at some stage in the victim-plaintiff-instigated disciplinary proceeding. We left it out because it is consistent with disciplinary proceedings now. We didn't think it advisable or necessary.

And I would suggest—I don't know this specifically, but my guess is that in the bill the last time it was put in either as a result of an amendment or because there has been a change in the disciplinary provision.

Mr. KINDNESS. I believe it was through an amendment offered by the gentleman from California, Mr. Moorhead, that it was put it in there. You are now telling us that you left it out and can't give us an answer now as to whether it would affect disciplinary proceedings?

Mr. CIVILETTI. That is a different question. I think it would affect disciplinary proceedings.

Mr. KINDNESS. So you personally think it ought to be left out?

Mr. CIVILETTI. That is a judgment I cannot make now, or off the top of my head, no.

Mr. KINDNESS. Thank you.

Mr. DANIELSON. Thank you.

Thank you, Mr. Civiletti. You have given us an excellent bit of testimony today, and I am glad we didn't get overambitious and have more witnesses scheduled.

Thank you very much. We will no doubt be in touch with you for questions along the line.

Mr. CIVILETTI. Thank you, Mr. Chairman.

Mr. DANIELSON. The next meeting of the committee on this bill will be tomorrow, June 21, at 10 o'clock a.m. in room 2226.

The witnesses at that time will be here from ACLU, Congress Watch, and the Fund for a Constitutional Government.

The committee will now stand adjourned until tomorrow morning at 10 o'clock.

[Whereupon, at 11:45 a.m., the hearing was adjourned, to reconvene at 10 a.m. on Thursday, June 21, 1979.]

[Additional material follows:]

GOVERNMENT ACCOUNTABILITY PROJECT
Institute for Policy Studies
1901 Que Street, N.W., Washington, D.C. 20009
(202) 234-9382

August 16, 1979

Honorable George E. Danielson, Chairman
Subcommittee on Administrative Law and
Governmental Relations
Committee of the Judiciary
House of Representatives
207 Cannon House Office Building
Washington D.C. 20515

Dear Mr. Chairman:

In response to Chairman Rodino's July 19, 1979 request, the Government Accountability Project submits these comments on H.R. 2659. The bill would amend the Federal Tort Claims Act (28 U.S.C.§§ 2671 et. seq.) to substitute an exclusive remedy against the United States Government for constitutional torts committed by federal employees, instead of holding the responsible employee personally liable.

The Government Accountability Project (GAP), a project of the Institute for Policy Studies, is a non-profit public interest group formed in 1975 to help restore and maintain confidence in the federal system by making public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing illegal government activities.

GAP has been especially concerned about civil servants whose careers are destroyed for having spoken out against governmental wrongdoing. Through public education, personal counseling and selective legal action, GAP works to protect the right of all federal employees to initiate criticism without fear of retaliation and to provide these men and women with vital support. See, e.g., GAP's publication, A Whistleblower's Guide to the Federal Bureaucracy (1977).

H.R. 2659 is an improvement upon legislation submitted last year by the Department of Justice. The bill assures the availability of liquidated damages. It waives the "good faith" defense. The proposed legislation provides for attorneys fees in addition to damages. Most significant, H.R. 2659 offers the victim a limited opportunity to initiate administrative disciplinary proceedings against the official allegedly responsible for a constitutional tort.

While these modifications are improvements, they can only be preliminary steps toward achieving the stated goals of the legislation. H.R. 2659 proposes to remove individual liability without decreasing individual accountability, a difficult task at best. It is not reassuring that the details of numerous provisions, in particular the proposed disciplinary proceedings, appear to be at odds with this premise. On July 12, 1979 the court in Halperin v. Kissinger, No. 77-2014, slip op. at 44 (D.C. Cir. July 12, 1979),reaffirmed:

> No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All officers of the gover n- ment, from the highest to the least, are creatures of the law and are bound to obey it.

The U.S. Court of Appeals drew this declaration from last year's Supreme Court decision, Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978). And in Butz, the Court was quoting its decision nearly 100 years earlier in United States v. Lee, 106 U.S. (16 Otto) 196, 220 (1882). Without substantial revisions, H.R. 2659 is a major step away from the basic principle of accountability by government employees.

Previous testimony before the Subcommittee has already established the need for the following revisions in the liability provisions:

-- The remedies for plaintiffs should be available for intentional as well as constitutional torts.

-- The remedies for plaintiffs are inadequate and should be amended to provide for punitive damages, increased liquidated damages and adequate class action awards.

-- The United States should waive the "discretionary function" defense for constitutional torts.

-- The Federal Tort Claims Act should include members of Congress, judges and prosecutors. They no longer need absolute immunity from suit, since the United States would assume liability.

-- Military officials should no longer be immune from suit for knowing, intentional violations of the constitutional rights of subordinates.

ABSENCE OF AN EFFECTIVE ADMINISTRATIVE DISCIPLINARY MECHANISM

GAP is particularly distressed with the inadequacy of the proposed administrative disciplinary proceedings. The key issue in evaluating H.R. 2659 is whether the administrative disciplinary machinery can effectively substitute for current liability as a mechanism of accountability. But the bill proposes a cumbersome administrative apparatus,. riddled with loopholes and opportunities for agency coverups.

For example, the proposed system effectively places presidential appointees beyond the law. For current appointees, disciplinary procedures could lead to nothing more than recommendations to the President. Appointees who have left the goverment could be punished with the loss of a month's salary,a token penalty for defying the Constitution. Presidential appointees should not be any more or less accountable to the Constitution than GS-3's or Presidents. They should either be treated the same as any other employee in the disciplinary proceeding, or excluded from H.R. 2659 altogether.

Far from expediting the resolution of disputes, the proposal will institutionalize lengthy delays. Under the guise of screening out frivolous allegations, the victim must first win his/her claim against the governmentin court before automatically triggering the disciplinary proceeding. This requirement would delay the administrative sanctions for years.*/ Even worse, there are no specific time limits on agency action. Most likely the disciplinary proceeding would then wind its way through the agency, the MSPB or some other review forum. Finally, the case could return to court.

At best, the victim of a constitutional tort will be limited to a subsidiary, outsider's role in the proposed disciplinary system. For all practical purposes, the agency where the alleged constitutional violation originated will control the entire disciplinary process. The agency will conduct the investigation and can refuse any assistance or participation by the victim. The statutory scope of review, "Such causes as would promote the efficiency of the civil service" (Sec. 8, § 2682 (5)), has nothing to do with constitutional torts. Instead, the standard is sufficiently vague to justify any conclusion on discipline. The Merit Systems Protection Board or other appeals authority will only review, without a hearing, to see whether a decision is "reasonable." (Sec. 8, § 2684 (c)). The Justice Department has interpreted this scope of review to mean "the agency chose among those options that a reasonable person would agree were available and feasible." (Section

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*/ Of course, one who cannot afford the time and expense of protracted litigation would be screened out of guaranteed access to full disciplinary proceedings, regardless of the merits of his/her claim.

analysis of H.R. 2659, p. 25) Virtually any disciplinary sanction provided for by law is "available". The mere act of imposing a sanction makes it "feasible". The bill provides for judicial review of decisions under the "arbitrary and capricious" standard. (Sec.8, § 2684 (d)) But no disciplinary decision could be "arbitrary or capricious", so long as it was "available and feasible". With these handicaps, the courts will find it nearly impossible to reverse administrative decisions on grounds of legal errors.

In short, the proposed disciplinary system establishes an elaborate, but ineffective check on agency disciplinary decisions.

PROPOSED AMENDMENTS

In order to eliminate unnecessary delays and to provide needed legitimacy to the disciplinary system, GAP urges that the Merit Systems Protection Board and the Office of the Special Counsel be given principal jurisdiction over the proceedings. The OSC would replace the courts and the agency for purposes of screening complaints and conducting independent investigations. The Special Counsel would be charged with investigating cases brought by any citizen. The OSC would conduct a 15 day preliminary review to determine whether there are reasonable grounds to believe the employee(s) committed an intentional or constitutional tort. Upon that finding, the Special Counsel would conduct a full investigation within 60 days and possibly recommend disciplinary sanctions to the agency. Within thirty days, if the agency does not agree to implement the recommendations, the Special Counsel would prepare a complaint to the Merit Systems Protection Board. The MSPB would render a final decision to the U.S. Court of Appeals, which would review questions of law de novo and questions of fact under a substantial evidence standard. The alleged victim of a constitutional tort could participate as a party throughout the proceeding and could appeal adverse decisions of the Special Counsel to the MSPB.

H.R. 2659 already delegates the principal role in administrative appeals to the Merit Systems Protection Board and the Office of the Special Counsel.*/ (Sec.8, § 2686(a) (4)) The changes GAP proposes will consolidate and streamline the disciplinary process and will place responsibility in an independent body already established to

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*/ Inexplicably, § 2687 (b) declares, "Regulations issued by the Merit Systems Protection Board under this section shall not become effective until they are approved by the Attorney General." (emphasis added) We can conceive of no reason why the Attorney General should have this absolute veto power over the implementation of the legislation. The Board is perfectly capable of adhering to statutory language and legislative history in issuing regulations.

promote government accountability. These changes will enhance the legitimacy of the entire disciplinary process by guaranteeing independent investigations and decisions on discipline.

Finally, this proposal would increase the effectiveness of the Office of Special Counsel under the Civil Service Reform Act. The Special Counsel already has numerous prosecutorial responsibilities against federal employees who engage in prohibited personnel practices, Hatch Act violations, arbitrary or capricious withholding of information under the Freedom of Information Act, or prohibited discrimination. (5 USC § 1206 (g) (1)) The Special Counsel has the authority to order agency investigations and to evaluate the adequacy of the agency's investigative report. (5 USC § 1206 (b)) By investigating and prosecuting disciplinary charges, the OSC undoubtedly will gain greater knowledge of wrongful agency practices, should they occur. This understanding would better equip the Special Counsel to evaluate and pursue whistleblower charges of improper agency activities.

We appreciate the opportunity to participate in these hearings. We will gladly respond to any questions that you might have.

Sincerely,

Louis Clark
Director

Thomas Devine
Assistant to the Director

STATEMENT OF VINCENT L. CONNERY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

I am Vincent L. Connery, President of the National Treasury Employees Union. Our union is the third largest in the Federal sector, representing approximately 115,000 workers, including those in law enforcement agencies such as the Internal Revenue Service and the U.S. Customs Service.

We appreciate this opportunity to submit our comments on H.R. 2659, a bill to amend the Federal Tort Claims Act. This legislation will have a dramatic impact upon the procedures for adjudicating misconduct charges brought by private citizens against employees of the Federal government. We do, however, perceive several conflicts between certain provisions of this bill and guidelines established under existing law.

The principle behind H.R. 2659 is fundamentally sound. We support the substitution of the United States as the defendant in civil actions brought against Federal employees acting within the scope of their office. We believe that protecting Federal workers from the threat of costly liability proceedings and inconsistent prosecution will enhance the efficient operation of our pubic service and enforcement programs.

We have always maintained that the vast majority of Federal workers are efficient and conscientious in serving the public. Nevertheless, situations may occur where the Federal government must compensate individuals whose constitutional rights have been violated by an employee. We therefore support the provisions of this bill which provide a remedy to citizens who have suffered as a result of the improper or wrongful actions of a Federal employee.

We believe it is equally important that Federal employees be protected from unnecessary harassment or unjust retribution. A careful examination of H.R. 2659, however, reveals that certain provisions are clearly inconsistent with procedures contained in the Civil Service Reform Act of 1978 designed specifically to protect the rights of Federal workers facing disciplinary action. These safeguards were thoroughly discussed and debated before the law was enacted and should not now be carelessly swept aside.

H.R. 2659 expands the right of private citizens to initiate administrative inquiries into the conduct of Federal workers. While we subscribe to the concept that Federal employees must be held accountable for their actions, we cannot support provisions of the bill which fall far short of guaranteeing a just and uniform system of disciplinary actions and apeals for these same workers. This bill should foster the goal of equal access to administrative review for both claimants and employees and not encourage truncated proceedings leading to quick, and possibly unjust, decisions.

For example, we are troubled by apparent conflicts contained in H.R. 2659 within the proposed system for initiating an administrative review of an employee's conduct. Under these provisions, a claimant may request a disciplinary inquiry within 60 days after accepting an administrative award. If the claimant instead seeks a judicial determination, he or she may initiate an inquiry within 60 days after a favorable judgment is rendered.

The third alternative contained in this section, however, typifies the lack of consistency and clarity which characterizes much of H.R. 2659. Under this provision, a claimant may request an administrative inquiry between 60 and 120 days after simply *initiating* procedures to obtain a judicial determination.

We believe that adoption of this provision would be highly unfair to Federal employees. It would allow agencies to conduct a review of an employee's conduct and possibly administer disciplinary action before the complete record of the facts is available from the judicial proceeding. Thus, the agency could reach a decision, and an employee would be subject to discipline, based on incomplete or undeveloped evidence. Such a procedure runs directly counter to any system of fairness and equity, and we urge that this provision be deleted from H.R. 2659.

The injustice of this proposal is compounded by the dilution of due process rights in H.R. 2659. Under Section 2684 of the bill, the head of the agency conducting the inquiry into the employee's conduct is granted "sole and unreviewable discretion" to deny that employee the right to examine and cross-examine witnesses or to "suggest witnesses to be called and documents to be producted."

We strongly object to any proposals which would weaken the due process requirements guaranteed under the Civil Service Reform Act, including those which H.R. 2659 would make discretionary. We can find absolutely no justification for weakening standards which are established under existing law. The full due process protections now afforded Federal workers, without exception, should be written into H.R. 2659.

The disregard for employee protections during administrative inquiries extends to decisions appealed before the Merit Systems Protection Board (MSPB) as well. The bill provides that the Board shall apply a lower standard of review in adjudicating employee appeals than that which is presently guaranteed under Title 5 of the United States Code.

Under Section 2684(c) of the legislation, the MSPB is required to uphold the findings of an agency administrative inquiry if the action taken is deemed to be "reasonable." Title 5, however, mandates that the MSPB review an agency action to determine whether it is based on a "preponderance of the evidence."

The legislative history of the Civil Service Reform Act clearly shows that Congress determined that the burden of proof should rest with the agency, not the employee, in cases brought before the MSPB. Clearly, "reasonableness" does not meet the same standard of proof envisioned by Congress when it acted to grant Federal workers the same rights enjoyed by all other Americans under the law.

The "reasonableness" standard also could subject employees to duplicative proceedings. Section 2686 of H.R. 2659 requires the MSPB to review an agency action upon the request of the claimant who initiated the inquiry and to apply the "reasonableness" test to determine whether or not the agency's action was justified. In contrast, the Civil Service Reform Act mandates that the Board adjudicate an employee's appeal of an agency action on the basis of whether or not the discipline was based on the preponderance of evidence.

Under H.R. 2659, therefore, it is quite conceivable that the Board could hold two separate hearings on the same case, each subject to different standards for adjudication. This potential for overlapping proceedings and conflicting decisions clearly threatens the careful balance achieved under the Civil Service Reform Act. We urge the Subcommittee to remedy this situation by revising H.R. 2659 to conform with existing law.

In summary, while we support the basic thrust of H.R. 2659, we oppose those provisions which seriously weaken the employee protections which were painstakingly developed during consideration of the Civil Service Reform Act. We believe that those sections of the bill which create a new system for adjudicating employee appeals and disciplinary actions be made consistent with the provisions now in effect. To do less would be a slight to the thousands of dedicated Federal workers engaged in serving the public.

Federal employees collect taxes and enforce laws and regulations which, though inconvenient for a few, are vital to the security and well-being of our nation as a whole. It is for such inconveniences that these workers are most often taken to task. We hope that the light under which the architects of this bill wish to scrutinize

Federal employees does not blind them to the legitimate rights of those same workers.

LIBERTARIAN LAWYERS ALLIANCE OF ILLINOIS,
Chicago, Ill., July 12, 1979.

Re H.R. 2659/S. 695.

GEORGE E. DANIELSON,
Chairman, Subcommittee on Administrative Law and Governmental Relations, House of Representatives, Washington, D.C.

DEAR MR. DANIELSON: Thank you for your letter of June 29, 1979 and the enclosures.

The above-referenced Bill, although better than that which was submitted to the 95th Congress, is still gravely deficient in the following respects:

1. It fails to provide an option for suit against either the individual or the United States. This defect would allow the immunization of all federal government employment employees and agents. The threat of a personal lawsuit is presently all that is limiting massive constitutional violations by federal employees. Disciplinary action is not enough.

2. The exclusion from liability of "libel, slander, misrepresentation, deceit or interference with contract rights" should be removed. There is no need for exclusions. Neither the federal government nor its employees or agents should have any greater immunity from suit than private citizens and private business entities. An exclusion invites action. It can never, properly, be government's purpose to slander, misrepresent or destroy a persons's business and livelihood.

3. Punitive damages should be permitted in accordance with established tort law for all cases under the FTCA. Once again, the federal government should be held to the same standard of responsibility as private citizens.

4. Attorneys fees should be awarded to the prevailing party. This is necessary to equalize the awesome defense capabilities of the federal government.

5. Jury trials should be permitted in FTCA cases for either side. There is no jurisdiction for juries to be excluded. Since judgements are paid out of tax revenues, citizens will have as great a concern for attacks on the Treasury as will federal judges. In fact, the deprivation of jury trials in these cases makes it appear as though federal judges are captives of the Executive.

Please make these remarks part of the record of your proceedings.

Thank you.

For Liberty,

SHELLY WAXMAN.

STATEMENT OF WILLIAM G. MALONE, PRESIDENT, FEDERAL BAR ASSOCIATION

I am pleased to advise this Subcommittee that the Federal Bar Assoication supports the enactment of H.R. 2659, 96th Congress, which could make the Government liable for constitutional torts and the exclusive defendant in all tort suits involving Government employees acting within the scope of their employment.

The Tort Law Committee of our Association polled its members in April and June of this year to determine what the thoughts of Committee membership were with regard to this proposed legislation. Comments were received from attorneys who are employees of the Federal Government, as well as private practitioners who practice in the Federal sector. The consensus of these attorneys is that the enactment of this proposed legislation is critical to all Federal employees. The Association position is a result of the findings of this survey.

It has long been the goal of the Department of Justice, to extend the Government's exclusive liability beyond its present limited scope, i.e., coverage of Federal drivers, and personnel who perform medically related services in certain areas. However, there is some concern with the proposed disciplinary proceedings in the legislation, if they are not carefully monitored following implementation. The ability of claimants to initiate agency disciplinary proceedings against an employee, even in the event of a settlement of a claim, could encourage boilerplate allegations of constitutional torts in future tort claims and complaints.

The employee, on the other hand, whether innocent or not, and although entitled to legal representation, could be put to the expense of seeking private legal counsel in an effort to forestall activating the punitive disciplinary sequence.

Federal inspectors and collectors and the like are frequently the objects of harassment through claims and litigation, and they earn modest salaries. Protection through exclusive Government liability is clearly needed. However, if the disciplin-

ary proceedings clauses are very stringent, and not carefully monitored to prevent abuse, they can eviscerate the very protection afforded. Heavy financial and sociological burdens potentially could be places on the employees.

The disciplinary proceeding could conceivably interfere with the employer/employee relationship in the Federal sector, and divert a great deal of time and energy from the employee's official duties, beginning with the commencement of a claim. Such proceedings could discourage settlement of claims for lesser amounts since the employee knows that he or she may become subject to the risks of disciplinary actions or even to dismissal. This would be contrary to the avowed purposes of the FTCA which is to encourage settlement of claims administratively.

Thus, an employee would not, in fact, be immunized from the threat and chilling effect of lawsuits on his or her work as is intended by these proposals, but rather could be put in a position of defending two proceedings if the disciplinary proceedings portions of the proposed litigation are allowed to be used punitively by claimants.

Being sued for a substantial amount is no particular honor, and can become very unsettling to an employee who normally continues to attempt to do his or her job. Also, since the Government will have undertaken to be responsible, under the Federal Tort Claims Act amendments of this legislation, for the negligent acts of its employees, no claimant who has a good cause of action can be hurt.

Further, the misuse of Government employees as pawns in a legal battle can be eliminated. Such misuse occurs as a result of the fact that a plaintiff does not wish to wait the statutory period to sue the United States. Thus, by suing an employee, an attorney hopes to circumvent the administrative claims procedure and coerce the Government into premature appearances. Sometimes plaintiffs' attorneys attempt to intimidate an employee at the time of taking his/her deposition, even though the attorney well knows that the employee has no resources and that ultimately, if his client's cause is right, payment will come from the Government. Sometimes an employee is named because of the statute of limitations problem; i.e., the Federal Tort Claims Act limitation of filing the claim against the Government is 2 years, however, the regular statute of limitations in a death or personal injury case (for example in Maryland) is 3 years. If the attorney omitted filing the claim against the Government within the prescribed period, a suit against the employee would be the last gasp, even though the intended defendant is the United States.

It is the position of our Association that H.R. 2659 is adequately drafted so as to prevent the worst abuses envisioned by Government attorneys and the private bar. The proposed hearing requirements following resolution of a case in favor of a victim of a constitutionsl tort appear to be adequate to protect the rights of any Federal Government employee involved and careful monitoring can prevent abuses of the disciplinary proceedings by plaintiffs attempting to use such proceedings to punish government employees. In addition, making the United States liable for the torts of its employees in constitutional tort cases, as provided in section 3 of the proposed legislation, provides a constitutional tort plaintiff who is successful against the Government with a remedy, i.e., the ability to recover his attorney's fees and costs, in addition to damages, and allows institution of the disciplinary procedures proposed in the bill.

It is our position that enactment of H.R. 2659 would benefit Federal employees by removing the threat of an on-the-job decision resulting in a crippling personal lawsuit; would benefit plaintiffs by increasing their opportunity for compensation for constitutional wrongs including the recovery of legal fees; and most importantly would benefit the public as a whole, in whose interest the business of the Government is conducted.

AMENDMENT OF THE FEDERAL TORT CLAIMS ACT

THURSDAY, JUNE 21, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10 a.m., in room 2226, Rayburn House Office Building, Hon. George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Moorhead, and Mazzoli.

Staff present: William P. Shattuck, counsel; James H. Lauer, Jr., assistant counsel; Alan F. Coffey, Jr., associate counsel; and Florence McGrady, clerk.

Mr. DANIELSON. Today we continue the hearings on H.R. 2659, proposed reforms of the Federal Tort Claims Act.

Yesterday we heard from the Department of Justice. Today we have the honor of hearing from three witnesses: The American Civil Liberties Union, Congress Watch, and the Fund For Constitutional Government.

I see that some of you have already taken over the table, so, therefore, I don't have to decide who comes first.

Will you state your name for the record and proceed.

TESTIMONY OF KAREN CHRISTENSEN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY MARK T. DROOKS, LEGISLATIVE ASSOCIATE

Ms. CHRISTENSEN. My name is Karen Christensen. I am legislative counsel for the American Civil Liberties Union. I'm accompanied this morning by Mr. Mark T. Drooks, legislative associate at the American Civil Liberties Union.

Mr. DANIELSON. I want to suggest to Ms. Christensen, if you will, pull the microphone up a little closer. You have a very soft voice and it doesn't penetrate as well as some.

And I'm also going to, without objection—and there is none—say that your statement will be received in the record in its entirety, and you are free to proceed in any manner that you want. Just be your most effective self.

OK?

Ms. CHRISTENSEN. Thank you very much.

We would like to thank you this morning for the opportunity to present testimony on H.R. 2659 to amend the Federal Tort Claims Act.

The American Civil Liberties Union testified last year. We commend the subcommittee for many improvements this year in the pending legislation before the subcommittee in the 96th Congress.

Mr. DANIELSON. Modesty compels me to interrupt and give credit for those changes, probably, to someone other than myself. But anyway, I'm glad you liked them.

Ms. CHRISTENSEN. Specifically, we are pleased to note that there is included a disciplinary mechanism, waiver of the good faith defense, and that there is a limited election for plaintiffs to choose between proceeding against the individual officials and against the United States.

However, while we support the general thrust of the legislation, we believe that there are significant and fundamental problems which remain.

First, H.R. 2659, in our opinion, does not insure citizens an adequate remedy against the Government beyond what they have under developing case law. Indeed, the bill may retreat substantially from rights and remedies available under existing law.

Second, H.R. 2659, although immunizing officials from the individual liability, does not insure that the cost of this kind of litigation to the Government will be reduced. Private counsel may be dispensed with but the costs of litigation may simply be internalized without regard to whether plaintiffs are compensated or not.

In fact, there is a good chance that due to the passage of H.R. 2659, the complexity of litigation under the Federal Tort Claims Act may be increased, leading to longer litigation and expense both for the Government as well as for the plaintiffs.

Third, the disciplinary mechanism in H.R. 2659 may do little to improve employee morale or to satisfy the goal of providing official accountability for constitutional wrongs.

In H.R. 2659, the Department of Justice seeks to alter existing civil liability law so that where a Federal employee violates a citizen's constitutional rights, the victim will be able to sue the United States but not the indivudual employee responsible for the injury. Supposedly, the victim will benefit from these proposed changes in the following ways:

The defense of good faith that is currently available to individual defendants will be waived by the Government.

The victim is promised liquidated damages.

The victim is promised attorney fees awards separate from the damage award.

And, finally, the victim is enabled to initiate disciplinary proceedings against the official responsible for the misconduct.

All of these benefits are hinged on the finding of a constitutional tort.

What is a constitutional tort?

The Department of Justice makes it clear that not every constitutional violation is a constitutional tort. It also states in its section-by-section analysis of the bill at page 15 that a constitutional tort would be a tort as alleged and proven. This is very significant.

To this date only two constitutional torts have been recognized by the Supreme Court—unlawful entry and search of a home in violation of the fourth amendment, and most recently, in the *Davis* case decided just 2 weeks ago by the Supreme Court, sex discrimi-

nation in violation of the equal protection component of the fifth amendment.

While proponents of this bill claim that further development will occur in this area of the law and broaden the application of H.R. 2659, in our opinion, the bill, as drafted, will substantially retard development of a body of law defining the scope of constitutional tort. This is because the rationale behind the Supreme Court's recognition of a Federal cause of action has been the absence of alternative means by which the aggrieved citizen could vindicate his rights. In both *Bivens* and *Davis* the Court pointed out that there were no other avenues by which the plaintiffs could seek relief nor any adequate forms of relief other than damages. These decisions, *Bivens* and *Davis,* recognize a remedy; they did so due to the absence of any alternative remedy.

The proposed amendment to H.R. 2659 would provide the citizen and the courts with an alternative remedy. And at least two courts already have found that when such an alternative remedy exists, there will be no finding of *Bivens* action.

What does this mean?

It means that none of the benefits which H.R. 2659 supposedly affords plaintiffs asserting constitutional torts may be actually available to such plaintiffs. A plaintiff making a claim which is arguably sound in both constitutional tort and common law tort may well be forced to pursue the nonconstitutional tort route. The Department of Justice will argue that his claim is a "mere common law tort" if a tort at all. He will have to overcome the good faith defense; he will be unable to collect liquidated damages or reasonable attorney fees; and he will be unable to initiate disciplinary proceedings against the offending employee who is immunized from individual liability.

We know that the subcommittee could not have intended the unjust design which results from this analysis of H.R. 2659.

As pointed out, it is very difficult to distinguish between what a constitutional tort is and a nonconstitutional tort. Professor Kenneth Davis has noted that the attempt to draw the line between a traditional tort and a *Bivens* tort is sure to fail.

The court should not have to say "yes" or "no" to such questions as one——

Mr. DANIELSON. Excuse me, please.

[Pause for interruption.]

Ms. CHRISTENSEN. As Professor Davis stated, the courts should not have to say "yes" or "no" to such questions as whether one has a constitutional right not to be shot at by an officer, not to be hit in the jaw with an officer's fist, not to have one's property damaged by an officer, not to have one's privacy invaded, not to have one's reputation sullied.

To insure that the intended benefits of the proposed amendment are actually extended to citizens victimized by the unlawful conduct of Government employees, we suggest that a simple change be made.

The phrase, "intentional tort or," should be inserted before the words, "constitutional torts," or, "tort claims arising under the constitution," whenever these words appear.

Victims of egregious Government conduct would thus be guaranteed the waiver of good faith defense, liquidated damages, attorney fees, and a disciplinary inquiry.

This is not a radical suggestion. Inclusion of intentional torts within the express coverage of 2681 is supported by court decisions which have held that the United States is currently liable for the intentional torts of its employees under the Federal Tort Claims Act. Moreover, H.R. 2659 itself provides that the existing statutory exemptions for intentional torts will not be applicable to constitutional tort claims.

In addition to that proposed change, we also believe that the remedies provided by H.R. 2659 need to be strengthened in the following areas.

First, the bill precludes the award of punitive damages. The reason for this, the Justice Department asserts, is because the Tort Claims Act has always excluded such punitive damages.

Mr. DANIELSON. Off the record.

[Pause.]

Go ahead, Ms. Christensen.

Ms. CHRISTENSEN. Congress now is faced with many new questions concerning the types of tort claims that should be included under the FTCA. We believe that the subcommittee should amend the Federal Tort Claims Act to provide for punitive damages in this area.

This suggestion is supported by the fact that in 1983 cases, which are civil rights actions against state officials, the courts have generally awarded punitive damages for violations of constitutional rights.

A majority of courts have allowed consideration of punitive damages in Bivens-type cases. In calculating the jurisdictional amount, compensatory and punitive damage claims have been aggregated where the complaint alleges facts which meet the 1983 standard or show willful or malicious behavior.

Other areas which need to be addressed in terms of the adequacy of remedy include the arbitrary ceiling on the recovery of damages. The limitation of liquidated damages to $1,000 for violation of constitutional rights, or in the case of long-term, continuing violations, of $100 a day up to a limit of $15,000, is unreasonable. This amount should be increased or at least dealt with on a case-by-case basis with the potential of higher awards.

Class action damage awards are limited to $1 million, with the remarkable and anomalous result of permitting grossly inadequate recoveries for massive, large-scale violations. In one pending lawsuit of 100,000 class members, this means that if the Federal Tort Claims Act as amended by H.R. 2659 were in effect, the individual recover in that case would be $10.

Other problematic aspects of H.R. 2659 with respect to the adequacy of the remedy include: the disallowance of attorney fees for administrative claims, which require technical, legal expertise in making sufficient allegations for class actions at the administrative stage; maintaining the immunity defense for Members of Congress, judges, prosecutors, or persons performing undefined analogous functions; automatic retroactive application of the proposed amend-

ments to pending cases; and maintaining the discretionary function defense for even constitutional torts.

I understand that Mr. Civiletti testified yesterday that the department intends that the discretionary function defense be waived for constitutional torts. This is not at all clear in the provisions of H.R. 2659. The current language of the bill should be clarified to accomplish this intent.

The bill does not deal with the problem of official secrets defense. This should be addressed specifically in H.R. 2659.

Finally, the disciplinary procedure provided for in H.R. 2659 is an ineffective method of insuring official accountability. We note deficiencies in these areas:

First, disciplinary proceedings can be initiated only after an injured plaintiff has recovered under the Federal Tort Claims Act.

Second, a constitutional tort must be found to allow the plaintiff to initiate or appeal disciplinary action. The difficulties posed by this are created by the failure to have any definition for constitutional tort. This particular problem would be resolved if a disciplinary action was triggered for an intentional tort as well as for a constitutional tort.

Third, there is essentially no statutory standard for disciplinary action. The absence for such a standard presents due process problems both for victims as well as for employees.

At a recent Brookings Institute discussion of the proposed Federal Tort Claims Act amendments, Federal employees from a number of different agencies expressed concern about the fact that there was no standard. Employees do not know what standards of conduct they might be disciplined for. Victims do not know what standards the agency will impose on officials who had engaged in misconduct. This situation can only lead to an undermining of employee morale and public confidence in meaningful agency discipline.

A fourth problem with the disciplinary mechanism is the failure to provide for a mandatory hearing under any circumstances. Further victim participation in any hearing that does take place is totally discretionary with the agency head. In addition to being discretionary, victim participation is limited to suggesting witnesses, documents, and examining the witnesses called by the agency. Victim participation as well as employee participation in the disciplinary procedures should be more extensive.

There is no allowance for payment of participation expenses incurred by the victim who does participate in the agency inquiry. In many cases counsel would be a necessary component of that participation, and there should be allowance for counsel in participation expenses.

Inquiry can effectively be blocked by claiming an official-secrets defense, which means that the employee will claim that his defense requires the use of information specifically protected from disclosure by statute or in case of matters relating to national security, national defense, or foreign affairs, by Executive order. Not only the employee can claim that his defense requires this information, but, in fact, the person conducting the hearing may say, "Because this information is involved, I cannot go into those areas." And

those areas may be key to determining whether or not a disciplinary sanction is appropriate.

Sanctions for former employees and Presidential appointees are now limited to a fine equal to 1 month's salary. This is grossly inadequate. An incremental-scale penalty should be provided for in order to make these categories of employes subject to a meaningful range of sanctions.

There are also no express time limits on agency action, despite the fact that there are numerous time limits on victims. Victims must file a request for a disciplinary action within 60 to 120 days after filing a judicial proceeding under the Federal Tort Claims Act. They have a very limited time in which to appeal administrative agency action. There should be similar time limits imposed on the agency.

The term "Presidential appointees" is too broadly defined. We believe that this term should be narrowed to persons appointed with the advice and consent of the Senate.

We are concerned about the disciplinary procedures because of these specific deficiencies as well as the general knowledge about the proven ineffectuality of existing agency disciplinary proceedings. It is for this reason that we make these suggestions for changes in order to assure that the disciplinary mechanism is meaningful.

An example of the ineffectiveness of the existing disciplinary mechanisms is shown by the case of the Weather Underground FBI investigation. In April 1979 the Department of Justice Office of Professional Responsibility informed FBI Director William Webster that it had evidence of 32 illegal surreptitious entries, 17 illegal wiretaps, 2 unauthorized microphone installations, and numerous illegal mail openings conducted against relatives and associates of Weather Underground members. After 8 months of review, the Director informed the Attorney General that of the 61 special agents and 7 supervisors implicated in these illegal activities, disciplinary action was appropriate for only 2 agents and 4 supervisors. Ultimately, only mild sanctions were applied to the six employees. In the case of the special agents, the sanctions consisted of a letter saying that, "you've engaged in a deficient act, or omission," and calling for proper conduct in the future. Of the four supervisors, two were recommended for dismissal, one was demoted, and the fourth was suspended for 30 days without pay. It should be noted that dismissal does not affect retirement or pension rights.

In light of the serious and illegal activities, these sanctions were totally inappropriate and exemplify the problem of agencies policing themselves.

In conclusion, serious and controversial issues surrounding proposed Federal Tort Claims Act amendments persist. While H.R. 2659 presents improvements over legislation presented to the Congress last year, substantial work remains to be done to assure that remedies for violations of citizens' constitutional rights are amplified and not diminished.

At the same time, citizens must be certain that federal officials who engage in lawless conduct are appropriately sanctioned by means of civil liability or disciplinary action by their employing agency.

We look forward to working with the subcommittee on this important legislation.

[The prepared statement of Ms. Christensen follows:]

STATEMENT OF KAREN CHRISTENSEN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

On behalf of the American Civil Liberties Union, we want to thank you for this opportunity to present our views on H.R. 2659 which would amend the Federal Torts Claims Act (28 U.S.C. §§ 2671 et. seq.) to provide for an exclusively remedy against the United States government for constitutional torts committed by federal employees.

The ACLU testified before this Committee last year concerning an earlier version of this legislation, H.R. 9219. At that time, we testified that while the ACLU supported the goal of making the government liable for constitutional torts committed by federal officials, we could not support H.R. 9219 because it did not establish an adequate remedy against the government for constitutional violations nor did it provide a disciplinary mechanism to assure individual accountability and deterrence of constitutional wrongs.

While H.R. 2659 has added a disciplinary mechanism as a substitute for individual liability of officials for the commission of constitutional torts and barred the government from invoking a "good faith defense", we continue to oppose the bill in its present form. Contrary to the opinion of the Justice Department expressed here yesterday, the legislation as drafted accomplishes none of the objectives ascribed to it.

First, H.R. 2659 does not insure citizens an adequate remedy against the government beyond what they have already under developing case law. Indeed, the bill may retreat substantially from rights and remedies available under existing law.

Second, H.R. 2659, although immunizing officials from individual liability, does not insure that the cost of this kind of litigation to the government will be reduced. Private counsel may be dispensed with but the costs of litigation may simply be internalized without regard to whether plaintiffs are compensated or not.

Third, the disciplinary mechanism in H.R. 2659 may do little to improve employee morale or to satisfy the goal of providing official accountability for constitutional wrongs.

While we support the general thrust of this legislation, we believe that several significant and fundamental problems have yet to be resolved. In our testimony today, we will discuss these problems and then suggest the kinds of changes that are necessary to accomplish the objectives of the bill. Unless these changes are made, we will continue to press for the right of election to sue both the government and the individual official.[1]

I. Failure to assure victims of constitutional violations an adequate remedy against the United States

In H.R. 2659, the Department of Justice seeks to alter existing civil liability law so that where a federal employee violates a person's constitutional rights, the victim will be able to sue the United States but not the individual employee responsible for the injury. Supposedly the victim will benefit from these proposed changes in the following ways:

The defense of "good faith," currently available to individual defendants, would be waived by the United States.

Liquidated damages would be available where the nature of the injury makes proof of substantial actual damages difficult.

Attorney fees would be awarded in addition to the damage award.

The victim would be able to initiate disciplinary proceedings regarding the alleged misconduct by the individual employee.

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[1] In a growing number of recent cases courts have found the government subject to suit under the Federal Tort Claims Act for constitutional torts or common law torts in the nature of constitutional wrongs. See, e.g., *Founding Church of Scientology* v. *Director, FBI,* 459 F. Supp. 748 (D.D.C. 1978); *Norton* v. *Turner,* 581 F.2d 390 (4th Cir. 1978); *S.W.P.* v. *Levi,* 47 L.W. 2427 (1/9/79); *Birnbaum* v. *United States,* 436 F.2d 967 (2d Cir. 1978); *Avery* v. *U.S.,* 434 F. Supp. 937 (D. Conn. 1977); *Cruickshank* v. *U.S.,* 431 F. Supp. 1355 (D. Haw. 1977).

Although under the proposed anmendments the govenment would not be able to assert a good faith defense to constitutional torts, it is also not clear under the developing case law whether the government even now can invoke a good faith defense to a tort claims action within the constitutional area. See, *Crain* v. *Krehbiel,* 443 F. Supp. 202 (D.D.Cal. 1978) (good faith defense not available); *Norton* v. *Turner,* 581, F.2d 390 (4th Cir. 1978) (United States allowed to assert employee's good faith defense).

Each of these benefits would accure to a plaintiff who asserts a "tort claim arising under the Constitution of the United States, to the extent that liability for such claims is recognized or provided by applicable Federal law." [2] The phrase "arising under" implies that the plaintiff's claim will fail or succeed depending on a judicial interpretation of some constitutional provision. But the Department of Justice has made it clear that it expects only some but not all constitutional violations will fall within the remedial scheme of this bill.

"It is *not* contemplated that every unconstitutional act necessarily will rise to the level of a constitutional tort. The bill makes no attempt to define the breadth or scope of those rights or constitutional deprivations which are compensable under a *Bivens* theory. Rather, that is left to the developing case law. See e.g., *Davis* v. *Passman,* —— U.S. ——, No. 78-5072, (June 5, 1979)." (Emphasis supplied.) [3]

Assuming that the courts fulfill this expectation, H.R. 2659 would retard the development of constitutional tort law.

To this date only two "constitutional torts" have been recognized by the Supreme Court—unlawful entry and search of a home in violation of the Fourth Amendment and sex discrimination in violation of the equal protection component of the Fifth Amendment.[4]

While proponents of the bill may claim that further development of this area of the law would broaden the application of H.R. 2659, it is clear that the bill, as drafted will itself substantially retard the development of a body of law defining the scope of constitutional tort theory.[5]

The rational behind the Supreme Court's recognition of a federal cause of action for damages arising under the Constitution has been the absence of alternative means by which the aggrieved citizen could vindicate his rights. In both *Bivens* and *Davis* the Court pointed out that there were no other avenues by which the plaintiffs could seek relief nor any adequate forms of relief other than damages.[6] These decisions recognize a remedy, not a right.

The proposed amendments would provide the citizen and the courts with an alternative remedy. At least two courts (both in the Southern District of New York) have already held that a *Bivens* action does not exist where a remedy exists under the Federal Tort Claims Act. In *Hernandez* v. *Lattimore,* 454 F. Supp. 763 (S.D.N.Y. 1978) Judge Brieant wrote:

"The *Bivens* language that a remedy, to be implied, need not be indispensable or necessary was made in the context of no existing federal remedy. . . . For Hernandez, there is an existing federal remedy that protects the rights he asserts." *Hernandez,* id. at 769.

The plaintiff Hernandez was a federal prisoner allegedly assaulted by a prison official. The court dismissed the plaintiff's complaint, which had alleged violations of Fifth and Eighth Amendment rights.

Similarly, Judge Weinfeld of the Southern District dismissed a former prisoner's complaint which alleged Fifth and Eighth Amendment violations by federal detention facility employees and held "a new cause of action should not be created where the Federal Tort Claims Act already provides an adequate remedy for the constitutional deprivations alleged." *Torres* v. *Taylor,* 456 F.Supp. 951 (S.D.N.Y. 1978). The Court further stated:

"The rationale of *Bivens* does not justify plaintiff's cause of action under the Fifth and Eighth Amendments. Courts should not create new remedies where they are not necessary to guarantee federal rights and particularly where they would undermine the carefully considered procedures for raising claims." Id. at 955.

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[2] Sec. 3(a), § 2681(b)

[3] Section-by-section analysis of H.R. 2659 at 4.

[4] *Bivens* v. *Six Unknown Agents of the Bureau of Narcotics,* 403 U.S. 288 (1971), *Davis* v. *Passman,* 47 LW 4643 (6/5/79). Federal District Courts have found additional injuries to state a cause of action for money damages on a constitutional tort theory. See, *Cox* v. *Stanton,* 529 F. 2d 47 (4th Cir. 1974) (Thirteenth and Fourteenth Amendments: unlawful sterilization); *Paton* v. *LaPrade,* 524 F. 2d 862 (3d Cir. 1975) (First Amendment: unlawful FBI investigation pursuant to a mail cover); *Yiamoukyiannis* v. *Chemical Abstracts Inc.,* 521 F. 2d 1392 (6th Cir. 1975), *rev'd on other grounds on remand,* 578 F. 2d 164 (6th Cir. 1978) (First Amendment: employment threatened for speaking out against fluorides); *Dry Creek Lodge, Inc.* v. *United States,* 515 F. 2d 926 (10th Cir. 1975) (Fifth Amendment: denial of access to property); *State Marine Lines, Inc.* v. *Schultz,* 498 F. 2d 1146 (4th Cir. 1974) (Fifth Amendment: wrongful seizure of property.)

[5] The effect of the "sunset" provisions (these amendments will be effective for only five years) of H.R. 2659 (Sec. 10(c)) may be to further confuse and delay the development of a case law in this area.

[6] *Bivens,* supra, at 395; *Davis,* supra, slip opinion at 14, 17.

The plaintiff's complaint had alleged assult and battery by federal officials which are intentional torts for which the government may be liable pursuant to § 2680(h) of the Federal Tort Claims Act.[7]

None of the benefits which H.R. 2659 affords plaintiffs asserting "constitutional torts" are available to plaintiffs with non-constitutional tort claims. A plaintiff making a claim which arguably sounds in both constitutional tort and common law tort may well be forced to pursue the non-constitutional tort route. He will have to overcome the good faith defense; be unable to collect liquidated damages or reasonable attorney fees; and be unable to initiate disciplinary proceedings against the offending employee, who is immunized from individual liability by the terms of this bill.

The Department of Justice apparently intends that this distinction be maintained in litigation under the proposed amendments:

An award of such fees and costs in constitutional tort litigation would be governed by new section 2681(b), and would be separate from any damage award. Attorney's fees in non-constitutional tort cases would be payable by the client out of any judgment rendered in his favor subject to the restrictions of section 2678. As a result of this difference, skillful counsel may plead the existence of a constitutional tort when their case in reality sounds in a traditional, common law cause of action. It is intended that the courts be alert to such a possibility and rule on the attorney fees issue based upon the true gravamen of the tort as alleged and *proven.*[8]

The bill should be amended to provide the same remedial scheme for intentional as well as constitutional torts

Despite the legal niceties of such distinctions between constitutional and non-constitutional torts,[9] the need to make the aggrieved citizen whole is no less pressing in the common law tort area.

This subcommittee could not have intended the unjust design which results from H.R. 2659. To insure that the intended benefits of the proposed amendments are actually extended to citizens victimized by the unlawful conduct of government employees, we suggest that a simple change be made. The phrase, "intentional tort or", should be inserted before the words "constitutional torts" or "tort claims arising under the constitution" whenever these words appear.[10] Victims of egregious government conduct would thus be guaranteed the waiver of good faith defense, liquidated damages, attorney fees and a disciplinary inquiry.

Inclusion of intentional torts within the express coverage of § 2681 is supported by court decisions which have held that the United States is liable for the intentional torts of its employes under the Federal Tort Claims Act as it currently exists.[11]

Moreover, H.R. 2659 itself provides that the existing statutory exemptions for intentional torts willnot be applicable to constitutional tort claims.[12]

II. The remedies provided in H.R. 2659 are inadequate and should be substantially improved

As previously described, H.R. 2659 now offers a wholly inadequate remedy to victims of intentional or egregious misconduct due to the uncertainties of the term "constitutional tort." Even assuming that this serious deficiency was resolved satisfactorily, major problems remain with the damage provisions contained in Section 3.

First, the bill precludes the award of punitive damages. The Department of Justice has defended this aspect of the bill on the ground that "[t]he Federal Tort

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[7] See discussion p. 9, infra.

[8] Section-by-section Analysis of H.R. 2659, p. 15. (Emphasis supplied.)

[9] The partially dissenting opinion in a recent Supreme Court decision recognized "the illogic and impracticability of distinguishing between the constitutional and common law claims for purposes of immunmity." *Butz* v. *Economou,* ——U.S.——, 57 L. Ed 2d 895, 925 (1978). A noted legal commentator has stated "the attempt to draw the line between a traditional tort and a Bivens tort is sure to fail; the courts should not have to say yes or not to such questions as whether one has a constitutional right not to be shot at by an officer, not to be hit in the jaw with an officer's fist, not to have one's property damaged by an officer, not to have one's privacy invaded, not to have one's reputation sullied." Davis, Kenneth Culp. Administrative Law of the Seventies. Rochester, N.Y.: Lawyers Cooperative Publishing Co., 1976. pp. 583–584.

[10] Thus, the title of the new § 2681 would be "Intentional or Constitutional Torts." § 2681(a) would read "The head of each Federal agency may. . .consider, ascertain, adjust, determine, compromise, and settle any intentional tort or any claim sounding in tort for money damages arising under the Constitution of the United States. . ."

[11] See, *Hatahley* v. *United States,* 351 U.S. 173, (1956) (trespass); *Alliance Assurance Co.* v. *United States* 252 F. 2d 529 (2d Cir. 1958) (conversion); *Crain* v. *Krekhiel,* 443 F. Supp. 202 (N.D.Cal. 1978) (intentional infliction of emotional distress); *Black* v. *United States,* 389 F. Supp. 529 (D.D.C. 1975), vacated on other grounds *sub nom. Black* v. *Sheraton Corp. of America,* 564 F.2d 531 (D.C.Cir. 1977) (invasion of privacy).

[12] Sec. 4(c), H.R. 2659.

Claims Act has always precluded the award of punitive damages against the United States.[13] This statement begs the question, since Congress in amending the Act to explicitly cover tort claims arising under the Constitution—and potentially intentional torts—is faced with a new policy decision.

In making this policy decision, the subcommittee should be guided by two factors. First, in § 1983 cases (civil rights actions against state officials) the courts have generally awarded punitive damages for violations of constitutional rights.[14]

Second, a majority of courts have allowed consideration of punitive damages in *Bivens*-type cases. In calculating the jurisdictional amount, compensatory and punitive damage claims have been aggregated where the complaint alleges facts which meet the § 1983 standard or which show willful or malicious behavior.[15] Furthermore, to limit victims to compensatory damages ignores the fact that in constitutional tort cases the harm is often noneconomic and hence not recoverable in actual compensatory damages. The preclusion of punitive damages renders the benefit of a "financially responsible" defendant illusory for victims of constitutional torts.

There is also a problem with respect to the liquidated damages provisions of the pending legislation. H.R. 2659 imposes an arbitrary ceiling on recovery of damages which limits liquidated damages to $1,000 for a violation of constitutional rights or in the case of long-term, continuing violations, $100 a day up to a limit of $15,000.

Class action damage awards are limited to $1,000,000 [16] with the remarkable and anomalous result of permitting grossly inadequate recoveries for massive, large-scale violations. In one pending lawsuit of 100,000 class members, the individual award would amount to $10.[17]

Other problematic aspects of H.R. 2659 respecting the adequacy of the remedy include (1) disallowance of attorney fees for administrative claims [18] while requiring technical legal expertise in making sufficient allegations for class actions at the administrative stage; [19] (2) maintaining the immunity defense for members of Congress, judges, prosecutors or persons performing undefined "analogous functions": [20] (3) automatic retroactive application of the proposed amendments to pending cases; [21] maintaining the discretionary function defense for even "constitutional torts." [22]

III. The disciplinary procedure in H.R. 2659 is an ineffective method of insuring official accountability

As we have noted, H.R. 2659 immunizes individual employees from liability and creates an exclusive remedy against the government. The Department of Justice argues that the disciplinary procedures specified in H.R. 2659 are an adequate substitute for the accountability and deterrence provided by the scheme of individual liability in current law. We do not agree.

While we commend the Subcommittee for including a disciplinary procedure in this bill, we do not believe that this particular scheme is an adequate means of insuring that officials who violate constitutional rights or commit intentional torts are held accountable for their actions. The disciplinary mechanism is deficient in key respects:

Disciplinary proceedings can be initiated only after an injured plaintiff has proceeded under the Federal Tort Claims Act; [23]

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[13] Transmittal letter to the Vice President, dated Sept. 16, 1977.

[14] The plaintiff must show "either that the defendant acted . . . with actual knowledge that he was violating a right 'secured by the Constitution and laws,' or that the defendant acted with reckless disregard of whether he was thus violating such a right." *Adickes* v. *Kress Co.*, 398 U.S. 144, 233 (1970) (Brennan J., concurring in part and dissenting in part.); *Cochetti* v. *Desmond*, 572 F. 2d 102, 106 (3d Cir. 1978).

[15] E.g. *Hanna* v. *Drobrick*, 514 F. 2d 393, 398 (6th Cir. 1975), *Payne* v. *Government of District of Columbia*, 559 F. 2d 809, 821 (D.C. Cir. 1977); *Alexander* v. *Polk*, 569 F. Supp. 883 (E.D.Pa. 1978).

[16] Sec. 3, § 2681(d).

[17] *Socialist Worker Party* v. *Levi*, 73 Civ. 3160 (TPG) (E.D.N.Y.), Plaintiffs response to Federal Defendants Interrogatories, April 3, 1974, indicates the number of class members.

[18] Sec. 3, § 2681(b).

[19] Sec. 3, § 2681(d).

[20] Sec. 3, § 2681(b). Members of Congress, judges and prosecutors are not even federal employees within the coverage of the Federal Tort Claims Act § 2671.

[21] Sec. 10(b).

[22] In the Senate version, S. 695, the discretionary function defense is waived for constitutional torts (Sec. 9). The discretionary function defense has been rejected in several lower federal court decisions concerning constitutional tort claims brought under the Federal Tort Claims Act. E.g., *Avery* v. *United States*, 434 F. Supp. 937, 994 (D. Conn. 1977); *Birnbaum* v. *U.S.*, 436 F. Supp. 967, 973–74 (E.D.N.Y. 1977); *Cruickshank* v. *U.S.*, 431 F. Supp. 1355, 1359 (D. Haw. 1977).

[23] Sec. 8, § 2683 (a), (b).

A "constitutional tort" must be found to allow the plaintiff to initiate or appeal disciplinary action; [24]

There is essentially no statutory standard for disciplinary action: [25]

A disciplinary hearing is not mandatory; [26]

Victim participation in any hearing is discretionary with the agency head and is limited to suggesting witnesses and documents and examining witnesses called by the agency; [27]

There is no allowance for payment of participation expenses incurred by the victim who participates in the agency inquiry;

Inquiry can be effectively blocked by an employee under investigation who claims that his defense requires the use of "information specifically protected from disclosure by statute, or in the case of matters relating to national security, national defense or foreign affairs by Executive Order;" [28]

Sanctions for former employees and presidential appointees are limited to a fine equal to one-month's salary; [29]

There are no express time limits on agency action despite numerous time restraints on victims; [30]

The term "Presidential appointees" is too broadly defined.[31]

In the proposed amendments to the FTCA, the Justice Department is seeking to grant immunity to individual employees and officials in every case, even those involving intentional misconduct or reckless disregard for constitutional rights. To do so under the best of circumstances is questionable public policy; to do so where the Justice Department has failed to construct a mechanism to insure that employees are otherwise held accountable for their actions is clearly inappropriate and wholly unacceptable.

Our concerns about the proposed disciplinary procedure are founded upon the specific deficiencies listed above as well as general knowledge of the proven ineffectuality of existing agency disciplinary proceedings. The FBI's "administrative inquiry" into illegal investigative activities directed against the Weather Underground organization is a case in point.

In April, 1979 the Department of Justice Office of Professional Responsibility informed FBI Director William Webster that it had evidence of 32 illegal surreptitious entires, 17 illegal wiretaps, 2 unauthorized microphone installations, and numerous illegal mail openings conducted against relatives and associates of Weather Underground members. After eight months of review, the Director informed the Attorney General that of the 61 special agents and 7 supervisors implicated in these illegal activities, disciplinary action was appropriate for only 2 agents and 4 supervisors. Ultimately, only mild sanctions were applied to the six employees.[32]

In order to make the disciplinary procedure a meaningful substitute for suits against individual officials while protecting the due process rights of government employees, the following changes are necessary:

1. A disciplinary hearing should be mandatory whenever a citizen has recovered damages from an agency award, settlement or a judgment.

2. Standards for discipline should be established so that in cases of intentional misconduct, discipline would be mandatory rather than discretionary.

3. A full range of disciplinary sanctions, including an incremental scale of civil penalties for former employees and presidential appointees, should be provided.

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[24] Sec. 8, § 2683 (a), (b), (e).

[25] Sec. 8, § 2682(5) " 'disciplinary action' means removal, suspension without pay, reduction in pay, admonishment or reprimand, or transfer *for such cause as would promote the efficiency of the civil service.*" (Emphasis supplied.) The absence of a standard presents due process problems for both victims and employees.

[26] Sec. 8, § 2684(b).

[27] Sec. 8, § 2684(b).

[28] Sec. 8, § 2684(b).

[29] Sec. 8, § 2685(a).

[30] Sec. 8, § 2684(b). Victims must file a request for disciplinary inquiry "not earlier than sixty days nor more than one hundred and twenty days after the date on which such action is instituted." § 2683(b). Victims must appeal agency action "within sixty days after notification of the determination of an agency." § 2684(c).

[31] Sec. 8, § 2682(4), " 'appointee of the President' means an employee who is appointed by the President." This should be limited to persons appointed with the advice and consent of the Senate.

[32] Letter from William H. Webster, Director, Federal Bureau of Investigation to Attorney General Griffin B. Bell, Dec. 5, 1978. Two street agents were "censured", meaning that they merely received a letter which identifies a deficient act or omission and calls for proper conduct in the future. Of the two supervisors, two were "recommended for dismissial," one was demoted and the fourth was suspended for 30 days without pay. Dismissal does not affect vested retirement or pension rights.

4. An employee and the aggrieved citizen, as a matter of right, should be permitted to put on his or her case in the disciplinary hearing. Minimal due process safeguards such as the right to call witnesses, to present evidence, and to have the assistance of counsel should be included.

5. Costs of citizen participation in the disciplinary procedure should be reimbursible under specified circumstances.

6. In camera proceedings at the administrative level should be available whenever classified information is relevant to a resolution of the disciplinary issue.

7. De novo review of disciplinary hearings held by the agency in which the employee is held should be assured. Courts should review questions of law de novo and questions of fact on a substantial evidence standard.

Conclusion

Serious and controversial issues surrounding the proposed Federal Tort Claims Act amendments persist. While H.R. 2659 presents improvements over the legislation presented to the last Congress, substantial work remains to be done to assure that remedies for violations of citizens' constitutional rights are amplified and not diminished. As the same time, citizens must be certain that federal officials who engage in lawless conduct are appropriately sanctioned by means of civil liability, criminial prosecution or disciplinary action by their employing agency.

We look forward to working with this Subcommittee on this important legislation.

Mr. DANIELSON. Thank you.

I'm going to yield to Mr. Moorehead first.

And, Mr. Moorhead, I'm going to suggest—we've got three fine witnesses today, and we've got a time factor—how about you taking about 7 or 8 minutes, and I'll take a little bit, and then we'll move to the next witness.

Mr. MOORHEAD. Good morning.

You know the ACLU has been such a strong defender of people that find themselves accused, that I'm a little disappointed in the position that you take concerning Federal employees. Because they are a class of people, and a very large class of people, throughout our country. If we allow them to become the victims of, perhaps, anger, or vengeance, on the part of citizen victims, then their constitutional rights may be violated. I think that you have, perhaps, zeroed in on a very small area where there have been violations. I cannot forget the rights of the vast number of people that work for the Government, who will find themselves accused in disciplinary hearings and proceedings.

I would really like to see the ACLU concerned with the type of anguish and concern that those people are going to have to go through. Under H.R. 2659 a vengeful person could bring them to a position of hearings that might take many years to resolve.

Ms. CHRISTENSEN. Mr. Moorhead, I totally agree that the rights of Federal employees should be protected. The American Civil Liberties Union has defended Federal employees on numerous occasions and we are sensitive to the need for due process for Government employees.

My written testimony indicates that employees should have rights within the disciplinary process.

Mr. MOORHEAD. Should they have right to counsel?

Ms. CHRISTENSEN. In certain instances both the victim and the employee should be allowed to have counsel in the disciplinary process.

Mr. MOORHEAD. Well, isn't it more important where that person that is the accused, like the defendant in a criminal case? Now, isn't that just almost a basic thing in our society and under our legal system?

Ms. CHRISTENSEN. A range of minimal due process safeguards should be included in the hearing procedure. This would include the ability to call witnesses, to subpena documents, to examine and cross examine the witnesses and, assistance of counsel. We are certainly supportive of your suggestion to include counsel for both the employees and the victims.

Mr. MOORHEAD. Let me pursue one more point here.

Isn't it outrageous that the charges may be brought literally years after the events in question? H.R. 2659 allows the plaintiff to go through that entire civil process and then the employee is brought up for a disciplinary hearing. The employee may not even have control over the evidence, the witnesses; people may die. And, yet, then they must defend themselves.

I think it's terrible.

Ms. CHRISTENSEN. I agree. I think that is terrible. And I think that that sort of protracted disciplinary procedure is a problem to both the victim and the employee.

Mr. MOORHEAD. Well, the victim isn't going to be punished at that point, he's——

Ms. CHRISTENSEN. The victim is, the person whose rights have been trampled upon.

Mr. MOORHEAD. Do you know what we've giving the victim? We're giving the victim, for the first time, the assurance that he's got a defendant with money that can pay off his claim. You know, you sue a—most public employees haven't got anything but their homes. Not very many of them are rich people. They're people; they're human beings. They don't deserve to be trampled. And when they're sued, the chances are the victim can't collect very often. We're giving the victim, under this legislation, a U.S. Treasury guarantee that they can collect their money. We're giving them $1,000 for every offense whether they can show any actual damages or not.

Ms. CHRISTENSEN. The promises that H.R. 2659 makes to victims—the liquidated damages, the attorney fees, and the waiver of the good faith defense—are really illusory because at a required finding of a constitutional tort. And, in our opinion, every time a vicitm files a Federal Tort Claims Act case saying "my constitutional rights were violated, this is a tort claim arising under the constitution," the Government can come in and say:

> Oh, no, it's not, this is a common law tort. This isn't a constitutional violation; therefore, victim, you're not entitled to that waiver or defenses, you're not entitled to that $1,000 liquidated damages, you're not entitled to separate attorney fees, and, by the way, you're not entitled to proceed in a disciplinary hearing against the official who violated your rights because this is only a common law tort, not a constitutional tort.

Mr. MOORHEAD. Let me ask you this, though, on that point. You are a citizen of the United States. Would you like anyone to be able to bring a quasi-criminal action against you, without having at least the basic facts determined by an impartial judge? To be able to put you in a position of jeopardy just by filing against you? They may be your worst enemy, they may hate you, they may not care about law, they just want to punish or embarass you.

You may be able to prove you're innocent, that's all right. But to have to go through the disciplinary procedure—that is punishment in itself.

Ms. CHRISTENSEN. Mr. Moorhead, I think two things have to be noted. First of all, all that the victim is entitled to do by the provisions of the act is to initiate a disciplinary inquiry. That means that inquiries based on harassment and frivolous reasons can be immediately dismissed by the agencies.

Mr. MOORHEAD. Well, by the time they get around to it, won't a lot of time and a lot of anguish have taken place?

Ms. CHRISTENSEN. That is the whole point in saying that there should be time limits on agency action instead of saying that the agency should engage in any proceedings "without unnecessary delay." It is protection for the employee as well as for the victim.

Perhaps more important is the fact that all of these supposed benefits to citizens are really not there. They really are, in the words of Mr. Civiletti yesterday in talking about *Bivens,* they're really "hollow and mythical," because the citizen must prove that he has a constitutional tort before he can initiate a disciplinary inquiry.

It's going to be very difficult to prove constitutional tort. There are only two Supreme Court recognized constitutional torts, and it is very doubtful how and whether that——

Mr. MOORHEAD. This bill is a limited-scope bill and is aimed primarily at constitutional torts.

Ms. CHRISTENSEN. Mr. Moorhead, perhaps you can explain to me, then, what constitutional torts does the bill assure victims of all the benefits, under what situations do the victims have these supposed benefits?

Mr. MOORHEAD. All constitutional tort violations. I'm not prepared to recite them all, but they may be violations of the first amendment, the fourth amendment, and the fifth amendment.

Ms. CHRISTENSEN. The problem is that the Justice Department has said in its section-by-section analysis that not every constitutional violation is a constitutional tort. Later on in their section-by-section analysis they say that the constitutional tort must be as "alleged and proven." There are, in fact, only two constitutional torts. Because of the passage of this act, it is extremely doubtful whether there will be further Supreme Court recognized constitutional torts based on an evolution of the *Bivens* rationale.

Mr. MOORHEAD. I'm informed by counsel that while only two have been recognized by the Supreme Court, others have been recognized by the circuit courts.

Ms. CHRISTENSEN. This is true. Several Federal lower courts have expanded the *Bivens* doctrine, others have refused to. The question is, when these cases rock the Supreme Court will the *Bivens* and *Davis* rationale still exist for deciding there are further constitutional torts?

If H.R. 2659, as presently drafted, is passed, the answer to that question is "No." There may be no further definition of "constitutional tort" as committed by a Federal employee.

Mr. MOORHEAD. Well, I want to say, having run a legal-aid clinic for many years, and having defended a lot of people that were in difficulty, I'm very sympathetic to anyone whether they are a Federal employee, or anyone else that is required to go through any kind of proceedings that can end up with severe punishment. I

believe in strong law enforcement, but I have very great concens in this area. It is in that light that I am scrutinizing this legislation.

I do want to ask you one other question. I know we're going to get the bell here pretty quick, but I think it's something that you might add to the hearing.

Do you see a relationship between the enactment of H.R. 2659 and the proposed FBI Charter legislation?

What is the relationship that you see, if you do?

Ms. CHRISTENSEN. Well, perhaps Mr. Drooks, who is also working on the FBI Charter, would like to address that.

Mr. DROOKS. The ACLU supports the establishment of civil remedies for enforcement of the FBI Charter, and we would like to see those civil remedies brought under the Federal Tort Claims Act.

Mr. MOORHEAD. Are there civil remedies now in this FBI which are active?

Mr. DROOKS. No. There are not.

Mr. DANIELSON. Thank you, Mr. Moorhead.

Mr. MOORHEAD. Thank you, sir.

Mr. DANIELSON. Ms. Christensen, I drew one inference—maybe unjustly, but I drew it—in your testimony, and that is that you feel that we're probably better off if we just don't have this bill at all.

Ms. CHRISTENSEN. Well, I think that the bill, unless it is substantially improved, may——

Mr. DANIELSON. You mean changed.

Ms. CHRISTENSEN. Changed.

Mr. DANIELSON. Right.

Ms. CHRISTENSEN. Unless some specific changes which we referred to in our testimony are made, I'm not sure that it does, in fact, advance the rights of citizens. And I'm concerned that, in fact, it takes away rights that they have under existing law.

Mr. DANIELSON. You prefer no bill at all to the bill that we now have before us.

Ms. CHRISTENSEN. Yes. Although we support the general concept of having the Federal Government, a financially responsible defendant available to victims of constitutional violations, we don't think that this bill goes in the right way in insuring the victims of substantial remedies.

Mr. DANIELSON. One of your criticisms was that the amount of liquidated damages doesn't seem to be enough, it should be a larger figure.

Will you give me your opinion of what would be a proper figure?

Ms. CHRISTENSEN. I'm not really sure what a proper figure would be. I know that last year there were liquidated damage provisions in other legislation of $25,000. There needs to be much larger continuing violations. I'm really not prepared to give you an absolute top amount.

The problem with $1,000, or a ceiling of $15,000, is that it, in essence, freezes a couple of court decisions which have now held that $1,000 is what certain claimants are entitled to.

Mr. DANIELSON. Well, ma'am, I'm sure you know that laws evolve and change, and nothing on Earth is permanent, at least not in law. And there wasn't anything like a constitutional tort prior to 1970. I think that is the proper date. Things change, and I think you ought to recognize that nothing is born full blown. It takes a

little while to grow, mature, and develop its important features and fully to flower. So, I really question any validity of criticizing this effort on the ground that we can't complete the entire picture at one time. Because I don't think that you or I, or anyone else, knows what the entire picture is. It would have to grow based upon our experience with people, our experience with what are constitutional torts, which ones will become recognized in the future which are not today recognized. None of those were recognized a few years ago.

I really think that ACLU, which is an organization that I've admired, I think it is susceptible to making one mistake constantly, just constantly, and that is expecting every slice of bread out of the loaf at one time. I take a different approach. I think that everytime you get beyond one-half, where you've got the majority, it's better than nothing at all. Things grow. Half a loaf is better than none is an old saying, but I think I'd like to go a little bit farther; if you get 55 or 60 percent, I think you've done a great deal, because then you can go after the other 40 percent next time.

I hope you don't screw up the courage and enmity of your associates to the point of damaging the possibility that this bill will be passed by insisting on 100 percent perfection at one time. Because then there is no way you can get that; it just isn't here. Pragmatism should not be the god that we follow, but it certainly ought to be one of the road signs when we consider legislation.

I think we should do the best we can but not lose heart because we don't have the absolute perfect product, I mean perfect according to your standards. That's why I substituted the word "change" for "improve" in one of your comments, because perhaps the standards of ACLU may be wrong. You'll admit that ACLU has made a mistake at some time or the other.

Ms. CHRISTENSEN. Perhaps, before I joined the organization. [Laughter.]

Mr. DANIELSON. Well done.

Now, what do you mean by "accountability"?

You people brought up "accountability" a year ago. You say the trouble is the bill doesn't provide accountability by the employee.

What do you mean by "accountability"?

Ms. CHRISTENSEN. Well, by "accountability" we mean that right now, with the possibility of a *Bivens*-type action being brought against an official, that an official knows that if he violates someone's rights that he is going to be held responsible for his misconduct, he will be held personally responsible in civil action.

Mr. DANIELSON. I buy that. But now, what does that contitute?

Now, here we've got an employee who is personally responsible. Now, what do we do to him, 50 lashes?

Ms. CHRISTENSEN. Well, currently, Mr. Shattuck would be subject to criminal prosecution or he would be subject to me bringing a civil suit against him, requesting damages, saying: "You violated my rights, Mr. Shattuck, and I demand to be made whole, I demand damages."

Mr. DANIELSON. Could someone construe that to mean vengeance?

Ms. CHRISTENSEN. I assume that any time a lawsuit is brought a defendant can say that there is an element of vengeance involved.

Mr. DANIELSON. Well, is that present here? Is that present? Do you get some inner satisfaction of putting the public employee himself in the pillory rather than the Government? Does that make you feel better? Is it sort of like, you know, giving him a little punch in the jaw? Is that what you seek here?

Ms. CHRISTENSEN. Absolutely not.

What we seek is to assure that the official who is responsible in carrying out his duties knows that he is going to pay attention to what the rights of persons are. And we are afraid that if the Government picks up the tab for his misconduct, that he will feel free to engage in whatever illegal activities he wants to in carrying out his job.

Mr. DANIELSON. Well, don't you think that his employer, his employing department or agency, his supervisor, is going to know that it was his or her—ladies will do this, too—his or her act that brought on the lawsuit against the Government?

Mr. DROOKS. Excuse me.

But the track record on disciplinary proceedings has not indicated that that has been the result.

Mr. DANIELSON. You don't think that they know?

You think that if someone at Justice commits a tort, and then the victim sues the Government, they won't know that this particular person in their personnel department has committed the tort?

Mr. DROOKS. I certanly think that they know, but I'm not so sure that the employee can be convinced that certain consequences will follow from that.

In a recent mail-opening case in New York, the case went all the way to judgment, the CIA was found guilty of mail opening, and there was no disciplinary action taken against those CIA agents.

Mr. DANIELSON. Do you feel that the CIA did not know that it was this particular employee who did the mail——

Ms. CHRISTENSEN. The case that Mr. Drooks is referring to is the *Birnbaum* case where it was a CIA program to open the mail of U.S. citizens. They had a computerized list of 1.5 million people whose mail they opened, read, and photocopied. Someone brought a lawsuit against one of the agents who opened, read, and photocopied one of those letters, surely the agent knows that the agency was sued because of his misconduct. On the other hand, he can claim: "I was only following orders for this particular intelligence operation."

Mr. DANIELSON. Well, do you mean to tell me on the situation that we're discussing you say that the employer wouldn't know who did it. Do you mean to tell me that the CIA didn't know which one of its agents did this?

Ms. CHRISTENSEN. I'm sorry. If I said that I misstated.

No, the CIA knew which agents were engaged in misconduct in that particular situation. In other situations the CIA, or the FBI, or the Government may not be as aware of which agents are engaging in misconduct.

Mr. DANIELSON. My point is I'm trying to find out what you mean by accountability.

In the tort, if the Government becomes the exclusive party, then the Government is sued; they simply—you couldn't have an effective lawsuit if you didn't prove the facts. If you prove the facts,

you're going to know that it was John Smith who committed the wrong. I think we have to assume, at that point, that the agency will take disciplinary action if such is in order. And if that fails, the bill provides that the prevailing plaintiff can later request the agency inquiry. In fact, they can request it even if it doesn't fail, because the victim can say it wasn't strong enough, he didn't get enough discipline.

Ms. CHRISTENSEN. Although, as Mr. Moorhead pointed out, this may be years, and years, and years after the misconduct has occurred, which would make it very difficult for a victim, at that point, to challenge it.

Mr. DANIELSON. If I can interrupt you there. You made a good point there, and I certainly think that we ought to put a timeframe within the bill, not only in which the victim must make his complaint but in which the Government must react to it. We can cure that. And I propose that we will cure that.

Ms. CHRISTENSEN. Another concern that we have in this regard is something which is contained in our written statement, and which I haven't discussed, is the sunset provision of the bill. These amendments will be in effect 4 or 5 years, and it is very unclear what this is going to do to developing case law, how this will affect the development of constitutional torts, and how will it affect the disciplinary actions or whatever 5 years from now. At one point I may be entitled to initiate a disciplinary proceeding and then no more amendment.

Mr. DANIELSON. Are you in favor of the "sunset," or do you oppose it?

Ms. CHRISTENSEN. We oppose it.

Mr. DANIELSON. That's not going to be a big problem. I really don't think so. I'd rather stick to the more essential things.

I don't think we fully agree—maybe sometime you can think up a real good argument that will convince me and I'd welcome it—but I get a feeling that in this constant calling for accountability we are masking the more basic animalistic tendency that we all have to seek vengeance rather than a practical way to achieve justice.

Now, if the same victim, or the same tort, were victimized by a nongovernmental employee, an ordinary citizen, what kind of accountability do you get beyond a suit for damages?

Ms. CHRISTENSEN. I think it is substantially different, because a Federal employee has the power of the Federal Government behind him. He is acting in the place of the Federal Government. And I think that there are higher standards of accountability and responsibility that are imposed on Federal employees.

Mr. DANIELSON. What accountability do you impose—I'm in a traffic accident and I injure somebody, I'm the defendant in a traffic accident—somebody got a leg broken, for example. What are the remedies of the injured person? He can sue me. And he has a right to expect to be made whole.

Now, let's assume he prevailed and is made whole; let's say he's awarded twice as much as he ought to have had in the first place, he's well rewarded. And let's assume I'm solvent and he is paid it.

Now, what remains? Is there some more accountability that we get out of this person?

There isn't any, is there?

How does that differ so much from the case against the Government employee—and which you're really going against the Government—who'll pay for the judgment?

Mr. DROOKS. Well, it currently doesn't differ at all, but this bill would put the Government in place of the employee as the defendant.

Mr. DANIELSON. But the plaintiff is made whole, isn't he?

Mr. DROOKS. Presumably.

Mr. DANIELSON. Well, let's assume that, just hypothetically, that he's made whole. Let's say he gets twice as much as he's entitled to; he's made whole.

Now, what more does he have a right to expect?

Ms. CHRISTENSEN. I think that he has a right to expect that the Federal employee who engaged in this misconduct will have his behavior examined and it will be determined whether or not he acted in accordance with the law, or whether with recklessness, or maliciousness, or what ever sort of motive, violated that person's rights.

The problem is that if I sue you—you've run into my car and I sue you, and you've paid me the damages—and I'm made whole, you're going to be, essentially, taught a lesson by that; you're going to have been held accountable for the fact that you didn't drive very carefully last year. And that will teach you a lesson that holds you responsible for your actions.

If, on the other hand, I don't recover those damages from you, you don't learn the lesson, you aren't held personally responsible for what you do. And something has to be done to assure that you receive the consequenses of your misconduct.

Mr. DANIELSON. You're looking for some personal punishment. You hide the word, but that's what it boils down to, isn't it?

Ms. CHRISTENSEN. I don't see it in that way. No. I see it as holding someone responsible for the consequences of their acts and having them examine the acts that they engage in in fulfilling their duty, and deciding that—for example, in the mail-opening case, agents of the CIA have to know that when you open someone's mail, they know criminal law as well as any of us. They know what the law of privacy is, and they know that a judicial warrant is necessary to open up somebody's mail. And that is all that we're saying, is that if they chose to ignore the clear dictates of criminal law in that particular instance, that they will held accountable.

Mr. DANIELSON. Ma'am, this bill does not cover criminal violations.

Ms. CHRISTENSEN. No. I understand that. But the factors in the *Birnbaum* case, the opening of mail could have been prosecuted as a criminal prosecution, or proceeded under the Federal Tort Claims Act, as it was.

Mr. DANIELSON. He or she is still responsible for the criminal act. This bill does not absolve anybody of a criminal act.

Ms. CHRISTENSEN. No. It's true.

On the other hand, in terms of past history, there simply have not been criminal prosecutions of Federal employees who have been proven to have engaged in official misconduct.

Mr. DANIELSON. I yield back to Mr. Moorhead. And we've both overrun our time, probably.

Mr. MOORHEAD. I think that's true, but in America today there are many people committing crimes of all types and descriptions that never get caught. This track record of bringing robbers, and thieves, and burglars to conviction is very, very low. You talk about track records being low; the track record is low. We don't always punish everyone in the courts under our system of justice. We protect, under our Constitution, the whole proceedings so that nobody is—we try to get very few, if any, innocent victims that are found guilty. So, you can't complain because somebody wasn't punished the total *n*th degree in something that took place on the job.

Believe me, a Government agency is going to try to correct the situation that brings about a judgment against it. They aren't going to want judgment after judgment, being embarrassed, or that kind of thing. They're going to correct their employees so that it doesn't take place.

That's what we want. We want a society where these violations aren't taking place. But the general public interest it is not in vengeance.

Ms. CHRISTENSEN. Absolutely.

I think that the *Birnbaum* situation is a good case in point, though. There is no criminal prosecution, there is no agency disciplinary action, and the employees went free for an activity which was in violation of the victim's constitutional rights. I think that also, this example points out the need for an agency charter.

Mr. DANIELSON. The committee will now stand in recess for approximately 10 minutes. We have to vote.

[Recess.]

Mr. DANIELSON. We can resume.

Ms. Christensen, unless you have some real good thought you want inspire us with, which you are invited to do, I think we'll take the next witness because of the time constraints we have to try to live with.

Ms. CHRISTENSEN. I appreciate the opportunity to testify this morning, and I think that our statement fulfills the rest of the ——

Mr. DANIELSON. Your statement is quite exhaustive.

Ms. CHRISTENSEN. Thank you.

Mr. DANIELSON. And we'll probably be back in touch with you, and you are invited to communicate anytime you have some priceless idea.

Ms. CHRISTENSEN. Thank you very much, Mr. Danielson.

Mr. DANIELSON. Our next witness for today will be Congress Watch, represented by Nancy Drabble.

Ms. DRABBLE. Right.

Mr. DANIELSON. Come forward, please.

Ms. Drabble, we do have your statement. Without objection it will be received in its entirety in the record, and you may proceed.

TESTIMONY OF NANCY DRABBLE, STAFF ATTORNEY, CONGRESS WATCH

Ms. DRABBLE. Thank you, Mr. Chairman. Good morning.

And good morning, Mr. Mazzoli.

I appreciate the opportunity to testify this morning on the amendments to Federal Tort Claims Act.

One of Public Citizens principal concerns for a long time has been the accountability of the Federal Civil Service and the ability of citizens to be able to get effective redress of their constitutional claims. Like the Congress, we are concerned that the bureaucracy often doesn't do what it has been directed by law to do, and it is for this reason that we have been working to increase the accountability of Federal civil servants to the general public.

For the reasons that I'll discuss in just a moment, we support much of what is contained in this proposed legislation, but we do believe that some significant modifications should be made. Just to take the analogy that you mentioned earlier, I'd say right now we think this bill has about 50 percent of the loaf, and with a few of the amendments which I'll suggest, it would get up to about the 65 percent, which seems to be the maximum we can ever get for a piece of legislation in this Congress.

Currently, citizens who have had their constitutional rights violated by Federal officials, whether they be FBI agents or HUD inspectors, can sue in tort for damages incurred as a result of the constitutional tort. In these suits the Justice Department has a policy of hiring expensive outside counsel to represent the sued employees. To get out from under the financial burden of these suits, the Justice Department has proposed this bill.

This bill makes the United States and not the offending employee the exclusive defendant in constitutional tort cases. Although the injured plaintiff can collect damages under the Federal Tort Claims Act, the Government is held harmless under the bill.

In the past, the threat of personal liability has probably served as a deterrent to unconstitutional behavior, but because this legislation would eliminate the threat, the mechanisms for institution of a fair disciplinary proceeding are of critical importance to us.

There have been several changes made in the bill since last year when another member of our organization, Alan Morrison, testified on the bill, and we are particularly glad to see a disciplinary mechanism in the bill. I'd like to concentrate my testimony on our criticisms of the disciplinary mechanism. We do not have very many objections to the part of the bill dealing with constitutional tort and the use of the United States as the defendant in those cases, and so I'd just like to briefly summarize——

Mr. DANIELSON. That will be fine.

Ms. DRABBLE [continuing]. A few of the elements that we think are important to an effective disciplinary mechanism.

First of all, we believe it is important to have an effective trigger of that mechanism. The injured citizen should be able to trigger the disciplinary mechanism without delay. This is a point that was mentioned earlier; it is important to have some deadlines so that the agency has to institute proceedings, and they are begun quickly. Then there should be a trigger period so then the injured citizen can appeal or the employee can appeal.

We also think there is a problem right now in who can trigger the disciplinary mechanism. A plaintiff who does not bring a lawsuit, or who hasn't yet received a damage award cannot trigger the disciplinary mechanism. We don't think that these two questions

should be linked. There will be some plaintiffs who are not interested in monetary recovery. Often constitutional torts are unrelated to monetary recovery. Some claimants may only be concerned that the employee be held accountable for his actions and that the constitutional violation that occurred not occur again. Since the monetary damages are often meaningless, we think it is important that a plaintiff has an opportunity to seek the institution of the disciplinary mechanism even if he hasn't yet recovered some sort of settlement or brought a law suit.

The second point is that we believe it is important that independent determinations of the liability of the employee be made. Although the agency which employs the offending employee should have first opportunity to examine the employee's conduct, its decision should be subject to a thorough review by some other tribunal. In most cases this would be the Merit Systems Protection Board. But to insure that agency investigations are not whitewashings or coverups, the reviewing agency needs to have the power to determine independently the facts of the case and to reach its own de novo decision.

Third, we believe that the injured plaintiff should have the right to participate fully in the disciplinary proceedings, just as would be available in civil litigation. The employee should also have the right to participate in that proceeding.

Mr. Moorhead mentioned earlier that the employees do not seem to have sufficient rights to have counsel, to examine witnesses, to cross-examine witnesses, to have certain discovery rights, and to make oral arguments. There is just one short paragraph in the bill on the kinds of rights employees will have in these proceedings. We think that there should be due process guarantees both for employees and for victims of constitutional torts.

The fourth improvement we think needs to be made in the disciplinary mechanism is a fair right of appeal. We believe that there should be a right of appeal of the initial disciplinary action that is fair to both the employee and the victim. After the initiation of the disciplinary proceeding, monetary recovery is required before the plaintiff can trigger independent review. Again, we don't think these questions should be linked.

Example, a scenario could occur as follows. A person would file an administrative claim with an agency. Let's say the agency then initiates disciplinary proceedings very quickly after the filing of that claim. The agency then has 6 months to decide on the plaintiff's claim. The agency could complete its investigation very early on in those 6 months without any participation by the plaintiff. Once that 6-month period has expired and plaintiff has gone on to file suit, he would then have the opportunity to ask for disciplinary proceedings; but those proceedings may have already occurred at a very early time with no opportunity for him to to participate, and no opportunity to state his reasons for the need for discipline. So, when he would finally ask for a disciplinary proceeding, the agency would probably just say: "Well, we had one very early on, very soon after you filed your claim, and we will not consider it again." It is a Catch-22 situation. Therefore, the timing provisions of the bill should be amended so that when someone requests disciplinary

proceedings he will not discover his claim has already been considered and rejected.

A related problem is that, without monetary recovery, the victim can only get independent review with consent of the agency. It seems that there is a conflict of interest here because the agency will be very unlikely to consent to a review of its own internal disciplinary proceedings; it doesn't have much of an incentive to give that kind of consent.

These are the major problems that we see with the disciplinary proceedings, and we believe that this bill could be crafted into legislation that would be fair to both the employee and the victims of constitutional torts; that the premise of the proposal is worthwhile and achievable. As always we stand ready to work with the committee on the necessary amendments.

[The prepared statement of Ms. Drabble follows:]

STATEMENT OF NANCY DRABBLE, STAFF ATTORNEY, CONGRESS WATCH

Mr. Chairman, members of the Committee, I appreciate the opportunity to appear before you today to discuss the proposed amendments to the Federal Tort Claims Act contained in H.R. 2659.

Public Citizen is a nonprofit public interest organization, founded by Ralph Nader, which is actively engaged in advocacy and litigation before Congress, agencies and courts. One of our principal concerns has always been and continues to be, the accountability of the Federal Civil Service to the citizens and taxpayers on whose behalf it is supposed to operate. Like the Congress, we are concerned that the bureaucracy often does not do what it has been directed by law to do, and it is for this reason that we have been working to increase the accountability of Federal civil servants to the general public. It is primarily because of our concern about accountability that we are interested in this legislation. For the reasons more fully set forth below, we support much of what is contained in this proposed legislation, but believe that significant modifications must be made.

As we understand them, there are three major purposes behind these proposed amendments. The first is to provide a financially solvent defendant, the United States, in lieu of individual federal employees in constitutional tort cases. This substitution is intended to provide a meaningful opportunity for the plaintiff to recover damages. Second, the legislation would relieve individual employees of the threat of potentially ruinous financial judgments as a result of actions taken in the scope of their employment. Finally, the bill addresses the serious waste of money and attorney's time used in defending suits against federal employees. Substitution of the U.S. as defendant will make suit far less difficult and expensive for both the plaintiff and the defendant.

IMPROVEMENTS

We are pleased to note that several changes have been made in the bill since the last Congress, some of which we suggested in prior hearings. First, a potential constitutional infirmity has been corrected—i.e., there is an election provision which enables the plaintiff to decide whether he or she wishes to proceed against the employee [1] or the government for constitutional torts. Thus, the plaintiff can either exercise his right to a jury trial or can proceed against the government and benefit from the increased likelihood of actual recovery.

The present bill also retains the earlier provision allowing payment of attorneys fees and "other reasonable costs of litigation. . .incurred during judicial review if the court affords such person the relief sought in substantial measure." § 2688 (e). Most importantly, as we will discuss shortly, the present draft moves toward the establishment of disciplinary procedures necessary to ensure employee acountability.

Though this year's bill is undeniably improved, we have strong reservations about the sufficiency of the proposed disciplinary mechanism. In the past, the threat of personal liability has probably served as a deterrent to unconstitutional behavior. Because this legislation would eliminate that threat, mechanisms for the institution of fair disciplinary proceedings are of critical importance.

[1] This provision only applies when the employee is acting only within "color" of his employment instead of within the "scope" of his employment.

Any such system must have four essential elements:
1. A simple and fair triggering mechanism;
2. Independent determinations outside the employee's agency;
3. The right for claimants to participate in the process; and
4. A right of review of the agency's initial decision that is fair to both the claimant and the employee.

TRIGGER MECHANISM

As it is presently drafted, any claim which results in a judgment of settlement against the U.S. will be forwarded by the Attorney General to the administrator of the employee's agency. Then the agency is responsible for taking appropriate investigate or disciplinary action.

We are concerned that injured individuals who do not initiate legal proceedings under the Act and those who file administrative claims but are not awarded judgments are precluded from triggering the disciplinary mechanism, i.e., the present bill requires monetary recovery or the filing of a suit as a prerequisite for initiation of disciplinary proceedings. We do not believe these issues should be linked.

Some individuals may not want to go to court and seek monetary relief, may not be able to afford an attorney or find one willing to take the case on a contingent basis, or for any number of other reasons simply prefer only to ask that the individual employee be held accountable for his or her actions. There is, it seems to us, no rational reason to require a lawsuit, given the purposes behind the disciplinary proceedings.

We propose that the language requiring a monetary recovery or initiation of legal action be stricken from the bill. Instead, any individual alleging a constitutional injury should have the right to initiate disciplinary proceedings at the earliest possible date after the violation.

SUMMARY PROCEEDINGS

This legislation empowers the agency to summarily determine that the compliant is so lacking in substance that it does not warrant further inquiry. We object to this provision because it makes it too easy for an agency to stifle an investigation. The possibility of summary agency decision severely weakens the goal of employee accountability. History has plainly demonstrated that we cannot allow agencies the right to discipline or not discipline their employees. All too often, either directly or indirectly, employees are carrying out the wishes of their superiors when they are violating the constitutional rights of others. Under those circumstances, employees often will not be disciplined at all or will simply be given a gentle slap on the wrist. Moreover, with agencies disciplining their own employees, citizens will doubt that an impartial determination is being made. Unless this Congress is prepared to allow the wolf to guard the sheep, it should not permit the agencies alone to pass judgment on their own employees who are alleged to have violated the constitutional right of others.

Another aspect of the trigger mechanism which seems in need of revision is the requirement that the person prevailing must have done so on a claim "arising under the Constitution" in order to be able to file a disciplinary proceeding. That will inevitably trigger narrow and technical disputes about whether a statutory violation or a constitutional violation has taken place—for example, this inquiry would surely preclude the basis for the recovery in such areas as illegal wiretapping. The question ought to be whether the complaining party alleges that his or her constitutional rights have been violated, and that alone ought to be sufficient to start a disciplinary proceeding. Then the question will simply become whether the conduct found to have taken place is the kind for which discipline ought to be imposed, regardless of whether or not specifically violating a provision of the Constitution.

INDEPENDENT DETERMINATIONS

In our view the Merit Systems Protection Board should be the sole body for making independent determinations on disciplinary matters. We see no reason to have the agency pass on these matters in the first instance, since it presumably could have imposed its own discipline prior to the time that the complaint was filed. Nonetheless, since the agencies appear to want the first opportunity to impose discipline, we believe that such opportunity is acceptable, provided that it does not unduly delay the process and does not preclude review by an independent body. With regard to delay, the agencies ought to be specifically limited in the amount of time—no more than 60 days—that they may consider a case before the reviewing body would take jurisdiction.

INVITATION TO PARTICIPATE

Under the present bill the complainant has no right to participate in agency disciplinary proceedings unless invited by the agency administrator. Any meaningful attempt to determine whether disciplinary action is necessary cannot be made without active participation by the injured party. Giving the agency unreviewable discretion on whether to invite participation only leaves the door open to abuse. At the very least, the complaining party should be entitled to file briefs, attend hearings, present such evidence as he or she deems appropriate, and make oral arguments at the administrative level.

TRANSFERRED EMPLOYEES

The opportunity for avoidance of personal accountability is most obvious in the case of individuals who are presently working for a different agency than they had been at the time of the alleged violation. In these situations, the former employer will conduct the investigation and forward findings and recommendations to the new employer. After reviewing the findings, the head of the new agency will take whatever action is deemed appropriate. But the bill provides no incentive for the new employer to take any action. Unless there is relative certainty that some disciplinary action is likely, alleged violators may actively seek to transfer prior to the conclusion of the investigation.

RIGHT OF REVIEW

We also believe that the right to request administrative and judicial review of agency disciplinary proceedings is too limited. As with initiation of disciplinary proceedings, monetary recovery is required before a plaintiff can trigger an independent review. Recovery and the right to review should not be linked. An injured party who does not prevail should not be denied the right to seek review of the disciplinary proceeding.

Under the present bill, absent monetary recovery, an injured plaintiff may request independent administrative review only with the consent of the employing agency—whose determination is the subject of any appellate proceeding. The agency has a conflict of interest in determining whether its own decision should be reviewed. It seems highly unlikely that agencies will willingly or regularly consent to have internal disciplinary proceeding reviewed by outsiders. These provisions for administrative review create tremendous potential for agency self-protection, while minimizing the likelihood of an effective disciplinary action and the corresponding protection of the citizen's constitutional rights.

STANDARD OF REVIEW

With regard to the determination to be made by the independent body after the conclusion of the agency proceeding, there are two questions. The first of these is whether the determination would be made based upon the record before the agency or upon a new record. The bill as now proposed provides that in general the agency will have the opportunity to make the record, though the independent body could also supplement it if necessary. That seems satisfactory, but still leaves open the second question—what is the appropriate standard of review for determinations by the Merit Systems Protection Board? Section 2684(c) provides that the determination by the agency shall be upheld if "reasonable." We strongly oppose such a standard, both with respect to findings of fact, findings of violations, and the appropriateness of the punishment. The whole idea is to have an independent judgment made and not to allow the agency to continue to do what it will or will not do at its essentially unbridled discretion. Therefore, we would provide that the Merit Systems Protection Board should make a *de novo* determination, based on the agency record as supplemented if necessary, to determine whether a violation took place and if so, the appropriate punishment.

CLASS ACTION PROVISION

The bill contains a maximum award limitation of $1 million in class actions. This arbitrary ceiling on class action recovery is particularly inequitable with regard to large classes. As the class increases in size, each member's individual award would proportionately decrease. The ceiling on class action recovery should be lifted to permit case by case determination. We are also concerned about the procedure for initiating a class action. As it is currently drafted an injured party who files a complaint with the agency and is unaware that he is part of a class is barred from instituting a class action later. The importance of protection of constitutional rights

strongly supports more liberal standards for maintenance of and recovery in class actions.

In conclusion, Public Citizen believes H.R. 2659 can be crafted into legislation that will be fair to both employees and victims of constitutional torts. The premise of the proposal is worthwhile and achievable. As always, we stand willing to work with your Committee in drafting the necessary amendments. Thank you very much.

Mr. DANIELSON. Thank you, Ms. Drabble.

Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman. I have just two questions.

One, on page 3 of your statement, the third sentence to the last sentence of the first paragraph: "Because this legislation would eliminate that threat,"—the "threat" being the threat of personal liability for unconstitutional behavior—certain mechanisms for disciplinary procedures ought to be invoked.

Do you feel this legislation eliminates the threat of personal liability?

Ms. DRABBLE. It eliminates the threat of personal liability under certain circumstances. If an employee is acting within the scope of his employment, the United States is substituted as the defendant. It doesn't eliminate it in the situation where he is only acting under color of employment, in which case the plaintiff would have the opportunity to sue him.

Second——

Mr. MAZZOLI. You stand behind your statement that it eliminates the threat?

Ms. DRABBLE. Yes. Of course, there is still a threat of the disciplinary proceeding, so that to the extent that there——

Mr. MAZZOLI. Is there not legal proceedings?

Ms. DRABBLE. There is only a threat of legal proceedings for criminal violations, or if someone is acting within the color of his employment. So, those threats are still there. But the threat of civil liability is not there anymore when an employee is within the scope of his employment

Mr. MAZZOLI. Well, let me ask you, where do you think are most of the egregious violations that occur that really scream for relief?

Ms. DRABBLE. Well, I think that Ms. Christensen of the ACLU——

Mr. MAZZOLI. Give me separate issues.

Ms. DRABBLE. I think it is hard for me to divide it up and say where the percentages lie. If someone is acting intentionally, maliciously, is just using the color of his office to violate someone's constitutional rights, that is the kind of situation that does cry out for relief.

Mr. MAZZOLI. Would you just speculate where you think most of the cases—you've probably made a study, certainly better than I have, of the cases that have gone to court.

Which sector would they have fallen into?

Ms. DRABBLE. I really don't know whether cases mostly have fallen into one sector or not.

Mr. MAZZOLI. I would think that it would probably be the "color of situation" rather than the "scope of." And I think that probably that's the case; and the "color of," if I understand, is where we have options.

I would think that your statement, that it "eliminates the threat," would be an incorrect statement.

Ms. DRABBLE. Well, if you take one case, for example, the *Birnbaum* case which Ms. Christensen was discussing——

Mr. MAZZOLI. I wasn't here.

Ms. DRABBLE. Yes.

That was a situation where there was a pattern of opening people's mail. It was a CIA program. Now, I suspect that that would have been within the scope of employment since it was a regular agency program and a lot of people were doing it over a period of time. So, there is an instance of a situation in which people were acting within the scope of their employment. It was a quite obvious constitutional violation.

Mr. MAZZOLI. The certification on that.

Ms. DRABBLE. That points up one problem with the bill, and that's the question of how the Attorney General will define "the scope of employment" and the color of employment in each case. I'm not sure there is sufficient case law on the question to really determine that. And I would imagine that there could be a fair amount of litigation if someone wanted to allege that the employee was not acting within the scope of his job he was acting only under color; anyone could litigate that particular point.

Mr. MAZZOLI. The second question I have is your feeling that the trigger devices are wrong because it requires that a suit be brought before there could be some recovery, and you feel that there ought to be simply a situation in the law which would allow an employee to seek, or allow the aggrieved party to seek, disciplinary proceedings without either one of these events taking place.

Would you discuss that a little more?

Ms. DRABBLE. Yes.

I think a plaintiff should be able to request a disciplinary proceedings without restrictions. There still is a provision in the bill that safeguards the agency's ability to summarily dismiss the request if it doesn't contain a sufficient dispute to warrant a proceeding.

As I mentioned earlier, if the victim of the constitutional tort has to either wait until he gets some kind of——

Mr. MAZZOLI. Don't you want to say an "alleged victim"?

Ms. DRABBLE. OK. Alleged victim.

Mr. MAZZOLI. That is the point I was about to make. I think if you bring action, or if you bring a successful action, there's been a certain amount of evidence gathered, a certain set of facts displayed, which I think would certainly satisfy an impartial observer that, indeed, the person has been injured and, therefore, the rest of these actions in disciplinary proceedings would more recently unfold. They can just simply say, "I've been hurt, and I think this person ought to be sanctioned."

Ms. DRABBLE. But the alleged victim is only requesting a proceeding. That is what we ask, that they have the ability to request a proceeding and get an answer to that request.

Mr. MAZZOLI. The alleged victim in the second situation where there has been no preliminary action have the same opportunity to take part in proceedings, or would you agree that that person could probably go about his——

Ms. DRABBLE. No. I would divide it up. The way I would divide it up is that if there hasn't been a monetary recovery or a judgment in court, then the person should not have mandatory participation rights, but if there has been a judgment or a recovery, then the alleged victim should have a night to particpate in any disciplinary proceeding which the agency decides to proceed with.

There is another point I wanted to make about this issue. Mr. Moorhead earlier brought up the question of delay. If a claimant does have to wait to get monetary recovery or a judgment before requesting a proceeding, there is a burden on the employee too. Often, I think, the employees would prefer to get this disciplinary proceeding out of the way one way or another, and it would be difficult for him to wait around to see what happens in court or whether there's a settlement, before the disciplinary proceeding began.

Mr. MAZZOLI. Thank you.

Mr. DANIELSON. Mr. Moorhead.

Mr. MOORHEAD. I perceive that you are as concerned as I am if a civil action took 3 or 4 years, bringing a disciplinary proceeding against an employee for something that they did a number of years before.

Ms. DRABBLE. Yes. I think there is a problem with evidence getting stale, of an employee not getting a fair proceeding if time drags on. So, a very high value should be placed on trying to conduct the proceedings as quickly as possible.

Mr. MOORHEAD. It just like punishing the child for driving a car without permission 2 or 3 years after he did it. It's past that time; the disciplinary proceeding has no effect any longer in deterring that type of action. It's delayed too long.

What do you think about the right of counsel for the public employee that has disciplinary proceedings filed against him. Should he not have the right to counsel in all stages of the proceedings?

Ms. DRABBLE. I think probably so. One thing I would want to know, and I don't know the answer to this question, is how complicated a disciplinary proceeding such as this would be. Whether you need a right of counsel depends on whether both parties have an opportunity to call witnesses, cross-examine those witnesses, or conduct discovery. If all the procedural rights are included, then I think it would be absolutely critical for there to be a right of counsel for both the employee and the alleged victim of the constitutional tort.

Mr. MOORHEAD. Of course, you have another problem that is present. If the person bringing the charges has a right to counsel, that right might be present but not the right to have the Government to pay for it. And that's not even what we're asking for as regards the person against whom the proceedings are brought. We're not asking for attorneys' fees. We're asking that he have a right to pay for his own counsel and have the counsel there. The person bringing the proceeding has the right to retain a lawyer if they want to, just like we feel that the person being accuses should have that right.

If we should start paying somebody to bring a disciplinary proceeding against another, you're going to have those actions brought

just to make money for some unemployed attorney. And that's another problem that you have, because I'm a lawyer myself, as all of us are here. But there are a lot of lawyers that are very ingeneous in finding ways to keep busy. We don't want much of that going on.

Ms. DRABBLE. I think one of the purposes of this bill is to try to decrease the employment of some of the lawyers who have spent years defending the Federal employees under the present law.

Mr. MOORHEAD. Under this bill, if any victim is dissatisfied with the results of the disciplinary proceeding, he can appeal. And that decision would go to the U.S. circuit court of appeals.

Do you feel that that level, as opposed to the district-court level, is appropriate?

These aren't big, huge criminal files.

Do you think you should take it to one of the biggest appellate courts in the land, or should it go to a district court where they are prepared to handle file proceedings?

Ms. DRABBLE. Well, I don't think that the question of how busy they may be is pertinent, because the district courts and courts of appeal are busy. The question is: is the court set up to handle the type of review it is supposed to perform?

The court of appeals is set up to analyze what has occurred below, to look at the record, and to determine whether there has been any arbitrary or capricious action, or whether the decision does not meet substantial evidence. The district courts are in the business of conducting trials. And, so, it seems that the court of appeals is institutionally the preferable body to consider the appeal.

Mr. MOORHEAD. But do you know what could happen after it's sent up to the circuit court of appeals?

The employees of the court of appeals would then go over these decisions of the disciplinary board. They're going to go over it, and the judge is likely to either stamp it: "OK, we accept it" or "no, we don't," and that's going to be it in most cases unless there's a very unusual question of law that intrigues them.

Usually, if it would go to the district court, the judge is used to examining the facts on every case that comes before him, and while his staff may do some of the work, he's going to be more appreciably involved.

Ms. DRABBLE. I don't know that that would necessarily be true. Both the court of appeals and the district court would apply the same standard of review. I believe that we have to assume that whoever is entrusted with this responsibility will examine the case in a responsible manner and apply the standard of review that's prescribed.

Mr. MOORHEAD. Thank you very much.

Mr. DANIELSON. And I thank you, too. I do have one or two little questions. A couple of them are just expressions.

You made one comment that under disciplinary proceedings there is some fear that the Merit System Protective Board, or whatever you call it, would just possible whitewash or cover up an act. Those are your words.

Mr. DRABBLE. Maybe I misspoke, but what I thought I said was that there was a possibility that the agency for whom the employee

worked might just do a coverup, not the Merit Systems Protection Board. I would not suggest that the Merit Systems Protection Board might do that.

Mr. DANIELSON. I stand corrected.

But my point will be the same. I'm distressed and disappointed that—not with what you've said, but with the fact there seems to be more and more evidence as time goes by that nobody in America today has any faith in their Government. They seem to expect that anywhere in the Government there is going to be whitewash, cover up, or some form of corruption, even though not necessarily monetary. And that distresses me because I happen to have been a fan of our Government for quite a number of years. I still think it's the best that there is on the face of the Earth, and I'm afraid it may fall apart if everybody assumes that within the administrative and executive function the Government is somewhat pitted against the people. I won't accept that, but I keep feeling that the longer I'm exposed to such as this and anything else in Government, there's a bit of presumption or irregularity—there's growing up a presumption of irregularity, that what the Government does is wrong unless you can prove to the contrary. I won't buy that, but it distresses me that nice people like yourself, even Ms. Christensen, et cetera, good, dedicated, sincere, well-motivated people, have taken the tack that Government is all wrong, somehow that there is a growing battle between the American people and their own Government.

That worries me. It contains within it the seeds of something that I don't want to see.

Mr. DRABBLE. It worries me too, Mr. Chairman and I think that we would all like to trust the Government even more.

Mr. DANIELSON. I think we're going to have to, because it's one of those things in life that you can't do part way.

I'll get off of that, but it really is a worry of mine.

On discipline, the word "accountability" is used as sort of an interchangable term here. We're not talking about money damages, because we're going to assume that the money—if this bill is passed—the money damages will be taken care of by a claim which is honored or by a lawsuit in which judgment is recovered for actual damages or in lieu thereof, or liquidated damages. So, I want to strike from our thinking the item of compensation for damages, getting back only to discipline.

What options does the Government have in discipline?

I suppose it would have to be either monetary to resemble penalty of some kind, or a forfeiture of a month's wages, or something of that nature, monetary, or an impairment of the job rights—a suspension without pay, or suspension with pay, who knows, or reduced pay, or, as they used to do in the FBI, transfer you to the least desirable field office in the country, usually Butte, Mont., in the wintertime, or demotion, or the ultimate, lose your job.

Now, is there any other—I don't think you want—I know, to make the record clear, we're not talking about corporal punishment. My comment about 50 lashes was symbolic only. I won't stand for corporal punishment myself, so I won't let you have it even if you want it, and I don't think you do.

Ms. DRABBLE. No.

Mr. DANIELSON. What other form of discipline can you think of?

Ms. DRABBLE. Well, I think you've run through all the forms that are suggested in your bill, and it is our position that those possibilities are sufficient.

Mr. DANIELSON. That they are, you think?

Ms. DRABBLE. Yes.

Mr. DANIELSON. Well, thank you. You and I agree 100 percent. I don't know what else you want beyond this.

Ms. DRABBLE. As long as those remedies are available and they are applied in the appropriate cases, they should provide a deterrent to employees who are thinking of committing constitutional violations.

Mr. DANIELSON. Did you say "deterrent"?

Ms. DRABBLE. Well, it would be a little late for a deterrent, because it would be after the fact, but if the disciplinary proceedings are conducted in a fair way, other employees would be aware of what had happened and——

Mr. DANIELSON. That's a deterrent.

Ms. DRABBLE. Yes.

Mr. DANIELSON. I'm glad to find one person such as yourself who admits that punishment has a deterrent effect. In some of the work I handle I'm assured that punishment has no deterrent effect, so don't punish people.

Mr. MOORHEAD. That's the worst thing, you know, someone who has worked 15, 18, years with no job. If they lose their job, they lose their pension rights, their family won't have anything to live on later on, and they're in pretty tough shape. But that can be as drastic as a year in prison sometimes.

Ms. DRABBLE. Losing a job is a very severe punishment and should be applied only in instances where there has been a constitutional violation. I also think that constitutional violation——

Mr. MOORHEAD. Well, that's all we're dealing with here.

Ms. DRABBLE. That's right.

I think it's important to keep in mind that it's difficult on the employee to be punished, but it is also difficult for someone to have had his constitutional rights violated. Protection of those rights is a high value in our scheme of Government. Those two interests must be balanced in this bill.

Mr. DANIELSON. I appreciate that.

I take it, then, that you don't take the position that accountability means that you have to bring the action for recovery for compensation against the employee so long as you have some other way to impose a form of punishment.

Ms. DRABBLE. Yes, as long as the employee is acting within the scope of his employment.

Mr. DANIELSON. Well, even if he's not acting within the scope. Now we're talking about color.

Ms. DRABBLE. Under your bill, if someone is acting under the color of his employment, the injured person can bring a suit against the employee or can file an administrative claim with the government.

Mr. DANIELSON. Well, so long as the injured person is made whole monetarily, what, then, is the point of bringing the suit against the employee?

Ms. DRABBLE. The point is that constitutional rights are important enough that there is value in making sure that as few violations occur as is possible. Permitting civil suits helps deter violations. I don't think that the analogy that you suggested earlier between personal injury cases and constitutional torts really applies here. There are higher values involved in constitutional rights, and, therefore, there should be higher standards of behavior and, perhaps, higher standards of liability.

You mentioned the example of the car accident and the fact that no one is subject to disciplinary proceedings for car crashes. But a person can have his driver's license taken away if he was drunk when driving. So, occasionally, there are——

Mr. DANIELSON. You're talking about crime now.

Ms. DRABBLE. Yes.

Mr. DANIELSON. They don't remove drivers licenses for less than criminal offense. And this bill does not absolve anyone of a criminal offense.

Ms. DRABBLE. That's true.

Mr. DANIELSON. Thank you very much for your help. Please communicate with us if you have any ideas for a solution, and maybe through the interchange of ideas we can come to—maybe we can get 66 percent instead of 65 percent.

Ms. DRABBLE. That's the goal we're striving for.

Mr. DANIELSON. Thank you very much, ma'am, and don't hesitate to be in touch with us.

We have one remaining witness, the Fund for Constitutional Government. I don't know who is here on their behalf, but won't you please come forward, take a seat, and identify yourself for the record.

Mr. DOBROVIR. Thank you, Mr. Chairman. My name is William Dobrovir, and I am counsel for the Fund for Constitutional Government. And with me today is Ann Zill, who is president of the fund. And we appreciate the opportunity to present testimony.

Mr. DANIELSON. Without objection your statement will be received in its entirety in the record. And I would appreciate it if you both would proceed to argue the best points of your case succinctly.

Mr. DOBROVIR. Thank you, Mr. Chairman. I will do that.

TESTIMONY OF WILLIAM A. DOBROVIR, COUNSEL, FUND FOR CONSTITUTIONAL GOVERNMENT, ACCOMPANIED BY ANNE B. ZILL, PRESIDENT

Mr. DOBROVIR. We have three or four main points which—suggestions which—we think would go a long way toward eliminating some of the problems that we, and perhaps some of the other witnesses today, have seen in the statute, although our focus may be a bit different.

First of all, there is a defense in the bill which the Department of Justice insists on retaining, and that is the defense of the absolute immunity of Members of Congress, of judges, and of prosecutors. It is quite appropriate and necessary for people like that to have absolute immunity from personal suit. The Constitution confers it on Members of Congress for the very important purpose of insuring that they can engage in their legislative activities without fear of sanction anywhere else. The judges and prosecutors, simi-

larly, have such awesome responsibilities that they should not have to fear having to pay out of their private pockets to disappointed litigants. But when the United States assumes responsibility, and assumes liability, and assumes the obligation to defend these cases, we think that the rationale for the personal immunity of these officials disappears. I think, particularly, it would be important for this body, for no longer its employees—members of committee staffs, the Clerk of the House and the Senate—to be subject to a suit because Members, of course, cannot be sued for legislative acts. We've seen lots and lots of cases in which that happens.

A second point is that there is a most, I think, egregious hole in Government liability today, and it is exemplified by the case of the soldiers who were marched up to the nuclear explosion in Nevada and were told to face the explosion, and were subjected to massive doses of radiation, many of whom now have developed serious cancers, including cancer of the breast. Today, under cases decided by the Supreme Court, those soldiers have no remedy, no remedy against the Federal Government under the Tort Claims Act, no remedy against a superior who negligently and with knowledge of the consequences might have done that. And we think that it is time now for Congress to end that particular anomaly in tort claims liability.

Mr. DANIELSON. Would you suggest what kind of an amendment you're talking about?

If you don't have it at the tip of your tongue or in your pocket you can sent it to us.

Mr. DOBROVIR. I'll be delighted to prepare something and send it to you, your Honor.

I've been in court too long, Mr. Chairman.

I will do that. I'll be happy to do that.

[Information referred to follows:]

AMENDMENT TO H.R. 2659

Add a new section 5, immediately following present section 4, to read as follows:

SEC. 5. Section 2674 of Title 28, U.S. Code, is amended:

(1) by inserting "(a)" immediately before the first sentence;

(2) by inserting after the word "damages" at the end of the first paragraph, the following new subsection:

"(b) The United States shall be liable, respecting the provisions of this title relating to tort claims based on negligent or wrongful acts or omissions, or violations of constitutional rights, for any negligent or wrongful act or omission of any person serving in the armed forces of the United States or employed by the Department of Defense, any component thereof or the Central Intelligence Agency, acting within the scope of his office or employment or under the color thereof, notwithstanding the status or employment of the person claiming liability for such negligent or wrongful act or omission. This section shall apply to claims which arose prior to the date of enactment of this section and to any civil action pending with respect thereto at the date of enactment."

(3) by inserting "(c)" immediately before the word "If" at the beginning of the present second paragraph.

Mr. DOBROVIR. Lastly, with respect to the disciplinary proceedings that have focused most of our attention this morning, we have one suggestion which we think would go a long way toward eliminating a lot of the problems that are seen from both sides of the spectrum on this, and that is to create an office that would serve the function, in effect, of prosecutor. We call him the disciplinary counsel. We copied the name from the Office of Special Counsel

under the Civil Service Reform Act of 1978. And that official would have the responsibility to initiate, where he finds reason to initiate, the disciplinary proceedings that the bill now provides for.

This provides a safeguard against, for example, the kind of vengeful activity that several of the people here have mentioned. Congressman Moorhead, in particular, I think was concerned about vengeance, and so were you, Mr. Chairman. This would, in effect, provide a buffer between the outraged victim and the person who he charges has violated his rights, an institution which would have the obligation to weigh the evidence and determine whether or not to bring the proceedings.

We also think that any member of the public ought to be able to bring to the attention of the disciplinary counsel a violation of constitutional rights which might trigger a disciplinary proceeding. Often, we think, the victim would probably have very little interest in pursuing this matter.

I guess I would differ with the feeling that there would be a great interest in vengeance. I think, in most cases, people are after compensation.

So, the Disciplinary Counsel would also be able to receive any allegation from any member of the public, and would have the duty to weigh it and then decide whether or not to act on it. The procedure is one which has been adopted in the recently enacted special prosecutor legislation, and we've seen that it seems to be working reasonably well. The Attorney General receives any allegation of wrongdoing or illegality by any of the people covered by that legislation. He has an obligation to determine whether or not to ask the appointment of a special prosecutor.

We also feel that the provisions respecting Presidential appointees, both former and present, are wholly inadequate; in other words, a fig leaf. To provide that a Presidential appointee, who has the greatest power and the greatest opportunity to violate the rights of citizens, could be subject to only a reprimand or, at most, having to pay 1 month's salary, seems to us to be entirely inadequate. And unless some kind of meaningful sanction can be devised and imposed upon such officials, we recommend that they not be given the immunity that this statute confers, and that they continue to be required to answer personally in damage suits under *Bivens* or *Davis* v. *Passman.*

Mr. DANIELSON. Let me interrupt.

Do you mean that you feel the provisions of the bill which would extend to making the Government the party defendant for a former employee should be stricken entirely from the bill?

Mr. DOBROVIR. Unless a stronger and more effective sanction can be devised.

The Department of Justice, I notice, said that there are constitutional problems. I think those constitutional problems can be eliminated by the device which is in the legislation of giving the appointee the election. I just think that the sanctions that can be imposed should be greater because the responsibility of the Presidential appointee is greater. Here we have the potential loss of this job, of his livelihood, by an ordinary civil servant, whereas a Presidential appointee does not have that sanction imposed on him.

Mr. DANIELSON. These employees have left the Government.

Mr. DOBROVIR. That's right, but there should be some stronger sanction. I have not, myself, given thought to what it might be, perhaps a stronger monetary sanction. Perhaps something that I've argued for——

Mr. DANIELSON. Does he still have the jurisdiction?

Mr. DOBROVIR. Well, the jursidiction, of course, is at the voluntary wish of the appointee. The bill presently gives him an election. If he wishes the immunity, and he wishes the United States to be substituted and to defend the case, then he must agree to accept the discipline if discipline is imposed. He must agree to appear in the disciplinary proceeding and defend, and so forth.

In response to one of the questions that Ms. Drabble was asked, what kind of discipline can be imposed, I think the higher the appointee the greater a sanction of public obloquy would be in terms of deterrent effect. I think, perhaps, to require that a member of the President's Cabinet walk around all day with a sign around his neck saying "I violated the constitutional rights of a Federal employee" might be a very great deterrent. And I only say that half in jest.

Mr. MOORHEAD. That would certainly destroy the credibility of the Government for everybody that saw it, though.

It would be a ridicule of the Government, wouldn't it?

Mr. DANIELSON. We used to do that in Boston.

Mr. DOBROVIR. I remember.

Mr. DANIELSON. And Williamsburg. You'd put them in stocks. They'd stand there for days; the kids would throw rocks and eggs at them, and so. Might have a real deterrent effect.

Mr. DOBROVIR. I think it would.

Mr. DANIELSON. Suppose the victim improperly brought charges, would you put him or her in the stocks at that point?

Mr. DOBROVIR. What is the definition of "improper"?

If the charge is found to be not proven, well, there could be an awful lot of cases that are brought which are brought in good faith but which don't prevail. And if everybody had rotten eggs thrown at them——

Mr. DANIELSON. Well, that would be depriving an employee of a good-faith defense.

Mr. DOBROVIR. Well, the employee has a good-faith defense in the disciplinary proceeding under the legislation. The Government will not raise it in the tort suit, which I think is proper. But there's a difference there.

We also are very concerned about the special provisions for the intelligence community. So many of the violations of constitutional rights that have come to light in the last 5 or 10 years have been committed by agents of the intelligence community—CIA mail-openings, FBI black-bag jobs, wiretaps, et cetera—that to permit the President to appoint what could very well be a "sweetheart commission" to handle disciplinary cases against such people, I think, is wrong. The Merit System's Protection Board can be relied upon to protect the rights of every Federal employee, and, of course, it can be relied upon to protects state secrets where it is appropriate to protect state secrets. I don't think we need a new special-secrets star chamber to handle a particular kind of disciplinary proceeding.

And, in the same vein, we oppose writing into the act a provision that permits court proceedings to be entirely closed. There's too much of the now. Secret opinions are being written by judges and locked in the safe.

Mr. DANIELSON. Would you recommend that the Supreme Court conduct its deliberations as we do our markup sessions, in open rooms?

Mr. DOBROVIR. No; not its deliberations. But, certainly, I would object to them conducting oral argument in a secret session with the public and the press excluded. That's what we're talking about here, not the deliberations but rather the trial or appellate proceedings themselves, which this bill permits to be entirely closed to the public.

That concludes my major points. I'd be happy to answer questions.

[Complete statement follows:]

SUMMARY OF TESTIMONY OF THE FUND FOR CONSTITUTIONAL GOVERNMENT ON PROPOSED AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT

The Fund for Constitutional Government, a nonprofit organization devoted to promoting honesty and accountability in government, urges major changes in the Department of Justice bill to amend the Federal Tort Claims Act. The bill would eliminate the present deterrent effect of personal liability of government officials for depriving citizens of constitutional rights, by substituting the United States as defendant.

The Fund urges:

Elimination of the defense of absolute immunity, now available to Members of Congress, judges and prosecutors, when the United States defends the case.

Liability of the United States for punitive damages, as individual officials now are, to promote vigilance by high officials to protect the Treasury.

Elimination of the immunity of military officials for knowing, intentional violation of rights of subordinates.

A drastic overhaul of the proposed administrative disciplinary proceedings to make them a real deterrent, by—

(1) creating an independent official to prosecute such cases, the Disciplinary Counsel;

(2) allow any member of the public to initiate a disciplinary proceeding and to participate fully as a party if he wishes;

(3) impose a mandatory, substantial monetary penalty on presidential appointees in exchange for the United States' assumption of liability—or, alternatively, require them to continue to answer in damages;

(4) eliminate the special protections for intelligence agency abuse; if anything, they need to be more severely sanctioned.

STATEMENT ON BEHALF OF THE FUND FOR CONSTITUTIONAL GOVERNMENT, BY WILLIAM A. DOBROVIR, COUNSEL, AND ANNE B. ZILL, PRESIDENT

Mr. Chairman and Members of the Subcommittee: the Fund for Constitutional Government appreciates the invitation to present our views on proposed amendments to the Federal Tort Claims Act, H.R. 2659. I am William A. Dobrovir, Counsel to the Honest Government Project of the Fund. With me is Anne B. Zill, President of the Fund.

The Fund for Constitutional Government is a nonprofit public charitable orgranization dedicated to remedying governmental wrongdoing, promoting honest and faithful performance of their duties by public officials and remedying breaches of the Constitution by government and its officials. Among other activities the Honest Government Project of the Fund conducts public interest litigation to expose and redress corruption and malfeasance by government officials, and to protect whistleblowers from abuse by their bureaucratic and political superiors. The Fund also played a role in the inclusion of new protections for whistleblowers in the Civil

Service Reform Act of 1978, by its call in 1976 for the establishment of what is not the Merit Systems Protection Board.[1]

The bill before the subcommittee today represents the second round of the Administration's attempts to protect federal officials from the developing doctrine of personal liability for international wrongs committed against the citizenry.[2] In its efforts to protect officials from liability the Administration has offered progressively more and more to the wronged citizen in exchange for eliminating his right to hold the wrongdoer liable in damages. The first bill,[3] introduced in the House by Chairman Rodino "by request," simply substituted the United States as a defendant. It added a provision for liquidated damages up to $1,000, but exempted the newly substituted United States from assessment of punitive damages.[4]

In response to criticism by organizations like the American Civil Liberties Union,[5] by the time of the 1978 hearings before this Subcommittee the Administration had sweetened the pot. On February 23, 1978, Attorney General Bell offered "to submit amendments to the bill prohibiting the United States from raising the good faith of its employees as a defense to liability for constitutional torts."[6] He also announced that, as a substitute for the deterrent effect of personal liability for wrongdoing, the Department of Justice was working on a procedure to discipline wrongdoers.[7] That procedure was to include participation of and could be initiated by the victim.[8]

Those changes were indeed incorporated in revised bills introduced in the last Congess[9] and this.[10] In addition to waiver of the "good faith" defense, the new bills also waived as a defense the absolute or qualified immunity of the official except judges, prosecutors and Members of Congress.[11] This did no more than recognize what the Supreme Court had already decided in *Butz* v. *Economou*, —— U.S. ——, 98 S. Ct 2894 (1978).

The present version of the proposed legislation continues as a defense for the United States the absolute immunity of judges, prosecutors and Members of Congress. It raises the limit on liquidated damages for continuing violations, like wiretaps, to $15,000 at $100 per day, but continues the exemption from punitive damages. It preserves immunity from liability for acts of military authorities. It contains provisions for disciplinary proceedings against wrongdoing officials, which can be initiated by the victim at the time he files his lawsuit.[12] But the disciplinary proceeding may only be initiated by the victim, it is cumbersome, it invites coverups and it is shot through with provisions that may do more harm than good to civil liberties and the principle of accountability.

For the bill truly to serve the objectives of compensating victims and deterring federal officials from tortious violations of constitutional rights, each of these defects needs correction.

ABSOLUTE IMMUNITY

Member of Congress have absolute immunity from suit for legislative acts, granted by the Constitution.[13] Judges have absolute immunity for judicial acts, as long as the judge has jurisdiction.[14] Prosecutors complete the priviledged triumvirate.[15]

The rationale for absolute immunity is to free the official to perform his duty without fear of having to defend himself. A Member of Congress should be "free to represent the interests of his constituents without fear that they will later be called

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[1] Gebhardt, et al.; "Blueprint for Civil Service Reform, a Fund for Constitutional Government Public Interest Report (1976)."

[2] H.R. 9219, 95th Cong., 1st Sess. (1977); S. 2117, 95th Cong., 1st Sess. (1977); S. 3314, 95th Cong., 2d Sess. (1978); Hearings before the Subcommittee on Administrative Law and Governmental Relations, House Judiciary Committee, 95th Cong., 2d Sess. February 24; April 27; May 3, 10 and 17, 1978 (1979) (hereafter House hearings); Joint Hearing before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, 95th Cong., 2d Sess., Jan. 26; June 15, 1978 (1978) (hereafter Sen. Hearings).

[3] N. 1, supra.

[4] S. 2117, n. 1, supra, which the Administration also requested to be introduced, was similar. See Sen. Hearings at 26, 39.

[5] See Sen. Hearings at 74; House Hearings at 79.

[6] House Hearings at 8; see id. at 79.

[7] Id. 9.

[8] Id. 15.

[9] See e.g., S. 3314, 95th Cong. 2d Sess. (1978).

[10] H.R. 2659, 96th Cong., 1st Sess. (1979); S. 695, 96th Cong. 1st Sess. (1979).

[11] S. 3314, § 3(b); H.R. 2659, § 3; S. 695, § 3.

[12] See House Hearings at 134, 159, 164.

[13] *Doe* v. *McMillan*, 412 U.S. 318 (1973); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967).

[14] *Stump* v. *Sparkman*, —— U.S. ——, 98 S.Ct 1099 (1978).

[15] *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); see *Butz* v. *Economou*, —— U.S. ——, 98 S. Ct 2894 (1978).

to task in the courts. . . ."[16] A judge should be protected to be "free to act upon his own convictions, without apprehension [17] of personal consequence to himself." For prosecutors, similarly, the purpose is to protect them from being "hampered in exercising their judgment . . . by concern about resulting personal liability. . . ."[18]

The point is for such officials to "be free to exercise their duties unembarrassed by the fear of damage suits," especially "vindictive or ill-founded damage suits. . . ."[19]

Where the United States defends the case and assumes liability, however, the rationale for immunity disappears. No longer need the judge or prosecutor fear personal liability or have to defend himself against disappointed litigants. The Member of Congress retains full constitutional protection against the executive branch, which is a main purpose of the Speech of Debate clause;[20] on the other hand no legislator need fear a "possibly hostile judiciary"[21] where the United States imterposes itself to defend the action.

Moreover, if the United States is no longer permitted to assert immunity, proceedings will be much simplified. Congress will gain particularly. Courts will no longer have occasion to peer behind "legislative acts" to find a triable non-legislative act,[22] nor will parties claiming injury seek out committee staff or servants of the House or Senate as defendants.[23]

We urge, therefore, that the United States not be permitted to imterpose the defense of absolute immunity in cases where it is substituted for an individual Member of Congress, judge or prosecutor.

PUNITIVE DAMAGES

Punitive damages, sometimes called exemplary damages, punish the wrongdoer and deter others from the same tortious conduct.[24] Individual official defendants are presently liable for punitive damages. This has an obvious deterrent effect. Liability of the United States for punitive damages would have an enhanced deterrent effect. Potential great liability will make the conscientious official in command more vigilant to prevent and to report tortious, unconstitutional acts by his fellows and subordinates, to protect the federal Treasury and the budget of his agency. Congressional oversight and public wrath will focus more quickly on a high official who permits his agents to subject taxpayers to a million dollar punitive judgment, than they will on a limited $15,000 liquidated damages award.

We urge inclusion of punitive damages against the United States in constitutional torts cases.

ACTS OF THE MILITARY

The Department of Justice tells us that the proposed amendments are not to affect the absolute immunity of military officials from liability for injuries suffered in military service.[25] This pernicious doctrine has been held to immunize the United States sued under the Tort Claims Act and individual officials sued at common law and under *Bivens*[26] for such acts as—

(1) intentionally and with knowledge of the consequences marching thousands of soldiers into the massive radiation of a nuclear weapon explosion.[27]

(2) surgical malpractice.[28]

(3) false imprisonment and administration of drugs against the plaintiff's will.[29]

In the most recent case the district court applied *Feres* "with the gravest reluctance," declaring that "[i]t is unfortunate that the law prevents this Court from

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[16] *Powell* v. *McCormack,* 395 U.S. at 503; but see *Briggs* v. *Goodwin,* 569 F.2d 10 (D.C. Cir. 1977).

[17] *Bradley* v. *Fisher,* 13 Wall. 335, 347 (1872), quoted in *Stump,* n. 14 supra, at 1104.

[18] *Imbler* v. *Pachtman,* 424 U.S. at 426.

[19] *Doe* v. *McMilian,* 412 U.S. at 319, quoting *Barr* v. *Matteo, 360 U.S. 564, 569 (1959).*

[20] *Powell* at 502.

[21] Id.

[22] *Powell* at 503.

[23] See *Dombrowski* v. *Eastland,* 387 U.S. at 84–85.

[24] See *Williams* v. *City of New York,* 508 F.2d 356, 360 (2d. Cir. 1974).

[25] *Feres* v. *United States,* 340 U.S. 135 (1950); *Jaffee* v. *United States,* —— F. Supp. ——, No. 78–1014 (D.N.J. Mar. 29, 1979) and cases there cited.

[26] *Bivens* v. *Six Unknown Named Agents of the Bureau of Narcotics,* 403 U.S. 288 (1971).

[27] *Jaffee,* no. 25 supra.

[28] *Bailey* v. *De Quevedo,* 375 F.2d 72 (3d Cir.), cert. denied, 389 U.S. 923 (1967). In 1976 Congress made the United States liable under the Tort Claims Act for military medical malpractice. See 10 U.S.C. § 1089.

[29] *Misko* v. *United States,* 453 F. Supp. 513 (D.D.C. 1978), appeal pending, No. 78–1882 (D.C. Cir.).

limiting *Feres* to orders made in the heat of battle.[30] It is time to lay this doctrine to rest. While the cases may be few, the injustice is great when a superior officer, with military force and Military "justice" behind him, intentionally and knowingly deprives a lower ranking soldier, sailor or airman of a constitutional right. The victim is uniquely helpless.

We urge that the *Feres* defense be expressly aborogated in cases of constitutional torts.

DISCIPLINARY PROCEEDINGS

We urge a substantial revision of the disciplinary proceeding provisions of the proposed amendments. Our proposal is to establish a new independent office, the Office of Disciplinary Counsel, to oversee, monitor and prosecute disciplinary actions against culpable officials.

The amendments currently would allow the victim of a constitutional tort to request an inquiry leading to disciplinary proceedings. He may do so at the time he files his action. Whether to open a proceeding is left to the tender mercies of the official's own agency. If the agency declines to initiate a proceeding there is adminstrative and then judicial review—but only after the victim has obtained a judgment. This will usually be years later, when the evidence is stale and interest has dissipated. In the meanwhile there is no remedy for a cover-up by the agency. The ongoing revelations about the General Services Administration do not engender great confidence in agencies' willingness to clean house. We urge immediate review of an agency's refusal to begin, or its hasty termination of the proceeding, without awaiting the end of trial and appellate court procedures.

Only the victim may request the inquiry. Often the victim may have no interest in pursuing this route, or no funds or time to devote to it. Yet it is the public at large that is harmed by the continued, unpunished tenure of a culpable official. Accordingly, we urge that any interested organization of member of the public be permitted, as a complainant, to request an inquiry.

The complainant has no right to participate as a full party. The Department of Justice calls him a "catalyst." Full participation, with the rights to present evidence and to cross-examine, is subject to the agency's unfettered whim, not subject to review however arbitrary. This too is an invitation to cover up. Participation as a party should be a matter of right at the complainant's election. The Department of Justice's fears of victims having knowledge of "privileged" matter (names of informants, state secrets and the like) can be handled as such matters are handled in court cases, by limited in camera document inspection and by protective orders.

The provisions for "discipline" of current and former Presidential appointees are wholly inadequate—a mere fig leaf for absolving them altogether from personal liability. Presidential appointees, the highest officials, have the greatest power to violate constitutional rights—yet, exchange for absolution from liability in damages, appointees who have left office need suffer no more than a reprimand or the ludicrous maximum penalty of one month's salary. For incumbent appointees there is no more than a recommendation of "appropriate disciplinary action" to the President.

It is not yet so long ago that we have forgotten the burglary of Dr. Fielding, Daniel Ellsberg's psychiatrist, under the supervision of the highest officials of the White House; burglaries and "dirty tricks" approved by an Attorney General of the United States, and break-ins conducted in the name of national security by the FBI Director's express approval. There is pending today in the District Court here an action by A. Ernest Fitzgerald against Richard Nixon and others for firing Fitzgerald for blowing the whistle on egregious cost overruns that the Pentagon sought to conceal.[31]

The defendants in *Fitzgerald* would doubtless leap at the opportunity to be free of liability in exchange for a possible masximum penalty of one month's salary, levied—if at all—in a proceeding from which Fitzgerald could be barred.

We urge, therefore, that the amendemnts be revised not to substitute the United States for presidential appointees as defendants in constitutional cases—unless there is a substantial, mandatory monetary civil penalty.

The proposed procedure also provides little remedy against abuses of constitutional rights in the name of "intelligence." These, recent history teaches, have been the most serious. Break-ins and burglaries, mail openings and wiretaps, the infamous "Huston Plan," the "Plumbers"—all were conducted or organized in the name of intelligence. They need more vigorous enforcement, not less. But such abuses are to be considered by a special body to be appointed by the President. It is too much to expect that this body will be anything but solicitous of intelligence agency desires

[30] *Jaffee*, n. 25 supra (the nuclear weapon exposure case).

[31] *Fitzgerald* v. *Butterfield*, C.A. No. 74-178 (D.D.C. April 27, 1979).

not to deter the enthusiasm of their agents and to mantain secrecy. We urge that all disciplinary proceedings be brought before the Merit Systems Protection Board (and prosecuted by the Disciplinary Counsel we recommend below) and heard in the first instance by Administrative Law Judges.

The amendments would carve in stone an unfortunate and dangerous tendency to close judicial proceedings in the name of "national security." If that specter is raised, court review of the disciplinary process can be held in Star Chamber, decided in Star Chamber, with the court's opinion locked in a safe. If such proceddings are to be secret, it should be only in the rare case where a court, based on adversary argument, finds the matter of such serious import to the nation's safety that some limited in camera review is needed. But in no event should the complaining party be excluded; the opportunity for a sweetheart proceeding between the intelligence agency and its burglarizing agent is too tempting.

In the last analysis, tinkering with the provisions in the amendments is less desirable than a new concept. We urge establishment of a new office, the Office of Disciplinary Counsel, analogous to the Office of Special Counsel established under the Civil Service Reform Act of 1978.[32] The Disciplinary Counsel would be charged with investigating cases brought to his notice by any person; notifying the agency that there is reason to proceed; monitor the agency's action, and if the agency fails to act then himself institute proceedings before the Merit Systems Protection Board. As noted, in all cases the complainant should participate as a party if he wishes.

To conclude: The developing doctrine of individual liability for constitutional torts offers some hope of substantially deterring such conduct. For the Executive to receive the mantle of immunity from Congress for such conduct, there must be provided an equivalent deterrent and no fewer rights than litigants now have. The changes we propose will help achieve that goal.

Mr. DANIELSON. Mr. Moorhead.

Mr. MOORHEAD. I just had one brief question, and that dealt with this *Passman* case, *Davis* v. *Passman*. The Supreme Court specifically did not decide whether the speech-and-debate clause was a defense against a suit based upon a constitutional tort. That issue is yet to be resolved.

Would it be wise for us to eliminate that defense for the United States in——

Mr. DOBROVIR. I think so.

Mr. MOORHEAD. We don't even know whether it exists.

Mr. DOBROVIR. Well, whether it exists for a member of Congress is, of course, to be decided as to the facts of that case. The question is not whether or not there is a defense of immunity to a constitutional tort in the abstract, the question is whether or not what Congressman Passman is alleged to have done in that case is a legislative act entitled to immunity. That is the issue that the Supreme Court said had to be decided below. If it turns out that what is alleged amounts to a legislative act, then there is no question but that the speech-and-debate clause confers immunity.

Mr. DANIELSON. Mr. Mazzoli.

Mr. MAZZOLI. Mr. Chairman, thank you. I have just two questions.

One is, the Fund for Constitutional Government, I don't know who you are. Who sponsors your group? Who pays the money?

Mr. DOBROVIR. Why don't I ask Ms. Zill to answer that question.

Ms. ZILL. The Fund for Constitutional Government is a 6-year-old publicly supported foundation, a 509A1 in the IRS tax code, a foundation which was started——

Mr. MAZZOLI. I'm not sure what a 509A1 is. What is that?

Ms. ZILL. It means it gives a foundation the right to bestow grants, to give grants to various projects.

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[32] 5 U.S.C. §§ 1204, 1206–08.

The Fund for Constitutional Government was started in 1973 in order to sponsor projects that would keep the Government as the Founding Fathers intended. It sounds like a right-wing organization; it is not. It has a board of directors consisting of people like Joe Rouse, until recently Charles Morgan, Perry Linsner, Margaret Gates—a number of other people. And it has a number of projects, the largest of which is now a Government project which is run by Bill Dobrovir and associates, and——

Mr. MAZZOLI. You make a grant to him to run a program, or is it run out of your office?

Ms. ZILL. No. We give grants to various programs. We have a judicial integrity project, a project on open government——

Mr. MAZZOLI. All done by people——

Ms. ZILL. Different people.

Mr. MAZZOLI. Well, because we have this lottery bill coming up, and I'm always curious about how people get here with their organizations, lobbying, and who sponsors which groups.

Ms. ZILL. Stuart is on the board of directors and one of the major funders, but not the sole funder.

Mr. MAZZOLI. The gentleman—sir, you were saying something about elimination of the defense of absolute immunity, which is now held by the Members of Congress, judges, and prosecutors, since—and bringing the Government into the case as the defendant. You say you agree with the rationale, that is that we should have absolute immunity in order to do our work and not be subject to lawsuits, and yet you say that rationale disappears when the Government can stand in and pay the damages.

Would not the rationale be the same? In other words, would we not be fearful to cost the Treasury money? Wouldn't we be fearful of taking action if the Government had to constantly be coming up with money or lawsuits against the Government filed over our actions?

Mr. DOBROVIR. That's a good point. I think, however, that it's outweighed by the fact that, in particular, a prosecutor or a judge has such enormous power to affect an individual.

Mr. MAZZOLI. My people at home tell me on busing cases that we ought to make the judges subject themselves to periodic election or some sort of refreshing of their mandate.

Do you believe that?

Mr. DOBROVIR. It has worked reasonably well——

Mr. MAZZOLI. Federal judges you would——

Mr. DOBROVIR. No; not for Federal judges. Our constitution provides——

Mr. MAZZOLI. Well, why not?

The constitution gives us immunity, too.

Mr. DOBROVIR. The constitution gives you immunity, and that immunity, I don't propose, should be affected at all.

Mr. MAZZOLI. Well, don't you think that the effect of your idea would be to destroy immunity?

Mr. DOBROVIR. I don't think it would, because you are not going to have to defend——

Mr. MAZZOLI. If a case is brought against the Government, whether named Mazzoli, or named Danielson, or named Moorhead, the tort fees are a malfactor?

Mr. DOBROVIR. No. It happens today. Senators and Member, of Congress remain in these cases, and the cases continue. There is a case that is going on today against Senator McClellan's executive.

Mr. MAZZOLI. The idea is, though, that you have a tremendous problem making such a case. I mean, you know, there might be some of these cases filed capriciously, but the fact of the matter is——

I think you're wrong. I think that is a dead wrong position and all you're doing is just so long as somebody is paying the bread, the rationale goes out the window. I think the rationale is, you know, consistent. And if it's important—and you seem to say it is—then it's important that you just should simply not let somebody take the bill and——

I have no further questions.

Mr. DANIELSON. I only have one.

First of all, let me remind you that I would appreciate if you'd send us your suggested amendment to take care of the problem that you have voiced.

Mr. DOBROVIR. I will do that.

Mr. DANIELSON. But beyond that, I would like to just try you out on the point of accountability.

What type of sanctions do you feel that the Government employee who has committed a tort—not a crime—must be subjected to in order to preserve the integrity of the governmental process? What are you going to do with him?

Mr. DOBROVIR. Well, to give you an awful lawyer's answer it has to depend——

Mr. DANIELSON. I think probably a good lawyer.

But go ahead.

Mr. DOBROVIR. It has to depend on the gravity of the tort, the gravity of the conduct, the quantum of malice, if any, the level of responsibility of the employee. Adverse actions against Federal employees can run the gamut from a suspension without pay for one day up to the ultimate sanction of discharge.

Mr. DANIELSON. It would be within those parameters?

Mr. DOBROVIR. It would be within those parameters.

And I think even lesser sanctions, which are not adverse actions, would be appropriate, depending upon the kind of case—a reprimand put in his personnel file, for example.

Mr. DANIELSON. So long as you've got it between those two parameters, that encompasses everything I can think of.

Do you see any real benefit to be gained by not permitting the Government to be substituted to be the party defendant rather than the individual employee?

Because all we're talking about here is money.

Mr. DOBROVIR. I think we feel that this bill is about at the 49-percent level right now, and it won't take very much more to get it to the 55 percent that you, Mr. Chairman——

Mr. DANIELSON. There's a couple of things that I don't know that all of you think about, but the need for this bill is not just to get the Government employees off the hook as defendants in civil actions. There is some real benefit to the Government, which means the taxpayers. We have spent—The Department of Justice is often in a conflict-of-interest position. We have spent more than

$2 million in the last couple of years employing private counsel. The private counsel are not under the direction of the Government. They don't provide the same point of view. They properly are looking after their clients, which they must do. But that oftentimes puts them into a position of conflict with the Government, with Government policy.

And, also, I practiced law for a while—and I'm sure you have—and you know that now and then the tactics are pursued in lawsuits which, really, Government wouldn't be too proud of.

Mr. DOBROVIR. Often committed by Government attorneys.

Mr. DANIELSON. Yes, sometimes. And oftentimes committed by others as well.

The Government has an awful time settling a lawsuit. You and I both know that the best way to dispose of a lawsuit is through settlement if at all possible.

But how are you going to settle a lawsuit where you might have four or five parties involved, and the settlement as to one or two of them would tend to prejudice the disposition of the case through the courts and the other two or three persons who are involved?

It's difficult.

We've been told by Justice, and I believe them, that if they could be in a position of standing in the shoes of the defendant, there are many cases which they could settle relatively quickly and at a net savings of money—because the longer the litigation drags out the more money goes into it, obviously—and probably to a net financial disadvantage even to the claimant. Because a long, strung-out lawsuit is not necessarily profitable to anybody—there would be a saving in court time.

I understand the Attorney General has been named as an individual defendant in something like more than 300 pending lawsuits.

There are things that we can correct here which are not simply a matter of letting the employee off the hook—speeding up the process.

Well, this is one of the factors that I had in mind, and it's not the most weighty factor in the world, but worthy of consideration. And I think we've got to consider that side of the case as well as the other that you're talking about.

But will we hear from you?

Mr. DOBROVIR. Yes. You will.

Mr. DANIELSON. That will be fine.

Mr. DOBROVIR. Thank you.

Mr. DANIELSON. And I hope you'll take the time to come back and see us in other occasions where your interests are involved.

Thank you. The subcommittee will stand adjourned—in a moment.

Do we have a further hearing date?

Mr. LAUER. The next hearing is next Wednesday, the 27th, with the Director of the FBI testifying.

Mr. DANIELSON. Mr. Webster. Fine.

That will be where and at what time?

Mr. LAUER. It will be in 2237 at 10 a.m.

Mr. DANIELSON. 10 a.m. Thank you.

Until that time the subcommittee stands adjourned.

[Whereupon, at 12:10 p.m., the hearing was adjourned, to reconvene at 10 a.m., on Wednesday, June 27, 1979.]

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AMENDMENT OF THE FEDERAL TORT CLAIMS ACT

WEDNESDAY, JUNE 27, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, McClory, and Kindness.

Also present: William P. Shattuck, counsel; James H. Lauer, Jr., assistant counsel; Alan F. Coffey, Jr., associate counsel, and Florence McGrady, clerk.

Mr. DANIELSON. It is 10 o'clock and the subcommittee will come to order.

We are delighted this morning and honored to have with us Judge William H. Webster, Director of the FBI. We continue our hearings on the subject matter of the bill, H.R. 2659, which relates to amendments to the Federal Tort Claims Act.

Judge Webster, you are most welcome. Without objection, your statement will be received in the record in its entirety, so you are free to proceed in whatever manner you wish.

TESTIMONY OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WEBSTER. Thank you, Mr. Chairman. The statement is rather short. I had planned to read it, but I will take the questions as they come.

Mr. DANIELSON. You just go ahead anyway you like.

Mr. WEBSTER. Thank you.

I appreciate this opportunity to discuss with you again my views concerning the proposed amendment to the Federal Tort Claims Act.

As all of you are aware, I support the passage of this legislation. In my view, the changes involved strongly recommend themselves to each concerned party.

Plaintiffs will find it easier to recover damages for injuries suffered. Government employees will no longer face the burden or potential burden of expensive, protracted lawsuits which undermine morale. And the Government itself should find its overall litigation costs arising from lawsuits against its employees, or, if the changes are enacted, related to acts committed by its employees much reduced.

These are reasons for supporting passage of this legislation. I could not give my support, however, unless I believed that Government employees and especially FBI agents would continue to be held personally accountable for their actions. Under the new amendment, I am convinced this would be so.

The FBI is highly selective of the men and women we hire. They are persons of good character, persons with established records of respect for the rule of law. Extensive training, second to none in the law profession, spells out as carefully as possible what is expected of them and what is prohibited of them, by law.

Nevertheless, I would be the first to admit that in an organization as large as ours a certain number of mistakes will be made by some of these individuals and that in a few cases these mistakes could involve malicious intent or a lack of good faith.

Given the nature of our work, both kinds of mistakes, innocent or not, will result in injuries to members of the public. Accordingly, we must have a system which, first, provides compensation for these injuries and, second, which corrects or punishes those who should be considered at fault.

Today, we don't have such a system. It is easy for a plaintiff with real or questionable injuries to sue agents or other Government employees, some who should and some who should not be penalized for possible tortious acts. The current system threatens every agent, law abiding or not, with financially disastrous legal action. Yet at the same time it rarely results in financial recoveries for plaintiffs.

The amendment is the answer to these deficiencies. It would substitute the Government as the exclusive defendant and eliminate the need to show that the defendant acted in bad faith.

The plaintiff, therefore, would have a solvent defendant. Equally important, he would no longer have to accomplish the difficult task of demonstrating bad faith in order to win his suit.

He would also be favored another way. Liquidated damages of at least $1,000 would be guaranteed if he could prove a tort had been committed. This would eliminate some of the difficulty in establishing monetary damages.

In many cases, of course, where it is apparent that there has been injury, the Government will be encouraged to settle. Litigation will often be seen as the more expensive and less desirable alternative.

In the past, this was not so. The Government recognized that individually sued employees were unwilling and financially unable to meet the costs of settlement. And owing to the possibility of punitive damages, the Government, even as codefendant, had no choice but to fully litigate each action.

Regardless of the merits, every threshold defense was asserted and every trial strategy was pursued. In short, encouraging settlement, as well as decreasing the Government's litigation costs, is another way of increasing plaintiff recoveries.

I said a moment ago that even with these advantages, I could not support this amendment if it lessened personal accountability. I should say, first, that this bill will eliminate the debilitating overkill effects of the old system caused again by the subjection of many law-abiding agents, incidentally named in a broadly drafted

complaint or intentionally harassed in an individual action, to the rigors of discovery and litigation. That granted, I believe the amendment provides strict accountability where it counts.

Every plaintiff who receives a monetary award from the United States because of any constitutional torts can require an administrative inquiry into the alleged incident.

Further, he may appeal the results of the inquiry, first to the Merit System Protection Board which replaces the Civil Service Commission, and, ultimately, to the courts.

Of course, we would ordinarily institute our own investigation of civil inquiries for which our agents might be responsible. Specifically, this duty is assigned to the FBI's Office of Professional Responsibility. This office investigates serious allegations against FBI personnel. Disciplinary measures are taken against agents when charges are found to have substance. It also reports on a regular, continuing basis to the Justice Department's Office of Professional Responsibility.

In addition, as you well know, neither civil suits nor internal disciplinary procedures can replace or protect an individual from criminal prosecution when that is warranted.

Since I met with you last, the bill has been altered very little. One exception concerns measures to be taken against former employees who are sued for acts committed while they were on duty.

Of course, if sued individually, they can face the suit alone. But if they choose to have the Government substituted in their place, there is now provision for a disciplinary inquiry which can result in a fine equal to as much as one-twelfth of the annual salary earned at the time the act was committed. I welcome this as a fair and worthwhile addition to the original measure.

The FBI has a strong interest in seeing the passage of this proposed bill into law. We believe that it will protect our agents from legal action which has no consistent connection to insuring legal performance of responsibilities; that it will boost morale and investigative effectiveness; and, finally, that it will provide a sound and sensible disciplinary mechanism in support of our overall system of accountability.

I make the foregoing observations in the best possible spirit for your consideration. If the members of this committee have any questions at this time, I would be happy to answer them.

Mr. DANIELSON. Thank you very much for your presentation.

Let me ask you, first of all, what do you perceive as the parameters of the discipline which could be imposed through the disciplinary proceedings?

Mr. WEBSTER. The discipline that I now have, and it would not be enlarged by this bill but could potentially be enlarged by the proposed FBI charter, is any form of discipline from censure and probation up to and including dismissal.

Mr. DANIELSON. The provision for one-twelfth of an annual salary, in effect a 1 month's compensation, would be an intraorganizational fine, I guess; is that correct?

Mr. WEBSTER. That is correct.

Mr. DANIELSON. I remember I used to try court-martials for the Navy during one of our wars. One of the punishments imposed was a forfeiture of so much pay. It is comparable to that.

Mr. WEBSTER. That is correct, Mr. Chairman.

We have provisions for suspension without pay for those who are on active duty. This would simply permit me to impose that type of punishment on a former agent up to 1 month's pay.

Mr. DANIELSON. So it would not just be a civil penalty of so much money, but a suspension of active duty which would carry with it a loss of pay for that period?

Mr. WEBSTER. That is correct insofar as current employees are involved. With regard to former employees, the sanction would be a civil penalty of up to one-twelfth their former annual salary.

Mr. DANIELSON. What is the maximum for that? Is it 1 month?

Mr. WEBSTER. There is no real maximum, but it is my understanding that if suspension of a current employee exceeds 14 days, under the present law it is considered to be adverse action and permits a veteran to appeal to the Merit Selection Board or to the courts.

Mr. DANIELSON. You mean under the present procedures?

Mr. WEBSTER. Yes, under our present procedures.

Mr. DANIELSON. A related point—I am touching on discipline almost entirely because I feel there is not much of a quarrel here about the other aspects of the bill.

The big controversy, to the extent there is one, relates to the disciplinary provisions. It is my belief that the vast, vast majority of tortious acts of Government employees are not accompanied by malice or lack of good faith or even by the degree of negligence which tends to bring about a greater culpability.

I believe they are like the common, everyday torts we run into in our lifetimes.

Do you feel that the provisions of the bill are adequate to protect the employee from charges of, from the request for an agency review, disciplinary action in those many, many cases where there is really nothing remarkable about the tort? It is almost like the automobile accident, you know.

Are you satisfied that they could not—I don't want them to become the subject of reverse malicious harassment.

Mr. WEBSTER. This is the condition in which we now find ourselves, I think. Our agents are exposed to malicious harassment in this area and this bill would, I believe, correct that problem for us.

It is my understanding of the bill that if the Government is substituted, then the issues of good faith are not considered. If the Government is not substituted, then the defense of good faith would always be available to an agent charged with some type of offense involving acting under color of authority rather than within the scope of his employment.

I believe the agent is adequately protected here as well as all the other parties in interest.

You are quite correct, Mr. Chairman, most of these cases, in reviewing the file, as I review the file, are problems of simple negligence. But we get a number of allegations that have to be run down each year charging that it was malicious or there was something wrong with it. Only in a very few instances do we find, in my review of the past year-and-a-half, cases in which an agent has been overbearing or deliberately abused his authority, very few.

But we do have the problem of the assertions and having to deal with them. When I was out in Chicago addressing this problem to the board of governors of the American Bar Association, one of them said, well, what have you really accomplished if the agent has to be a witness in the lawsuit against the Government? What is debilitating about that?

My response was that anyone who had been in the law business knew that there was a great deal of difference in terms of a person's morale and effectiveness between being a witness in a lawsuit and being a defendant in a lawsuit.

I think I saw every head nodding at that table.

Mr. DANIELSON. That brings in a host of collateral things, the right to settle without a big commotion.

Judge Webster, I am sorry, the nature of our business here is that we are being summoned by the bells at all times and we don't have a disciplinary board to prevent that.

Mr. MCCLORY. Perhaps we can each take 3 minutes.

Mr. DANIELSON. I will yield to the gentleman from Illinois, Mr. McClory. This is a profound vote, going into the committee as a whole.

Mr. MCCLORY. I want to say, first of all, how proud I am of the job that you have done as the FBI Director in restoring the high level of prestige to the Federal Bureau of Investigation and restoring public confidence in this agency which has been so extremely important.

Mr. WEBSTER. Thank you, Mr. McClory.

Mr. MCCLORY. Do you see any reason why we have to provide a minimum of $1,000 as an award? It seems to me there could be some violations that should just provide for a fairly nominal damage, and yet the person would still be compensated.

Mr. WEBSTER. Well, Congressman McClory, I think that is a policy judgment that went into a series of balancing factors. There unquestionably will be technical, constitutional torts that I would have difficulty finding rose to the level of $1,000.

I believe that the policy judgment in that area was that it would perhaps raise the sensitivity of the agency to make sure that the agency took all the steps necessary to keep its employees tuned in on their responsibilities. That was a policy judgment.

Mr. MCCLORY. We have had some obvious tortious conduct in my district in the last couple of days with sailors from Great Lakes Naval Training Center scaling the walls, throwing bricks, and destroying property.

Is there any reason we should not include the military in the Tort Claims Act, and allow persons to claim torts committed against them by the military?

Mr. WEBSTER. I don't know that I can respond to that. I can't think of any particular reason.

Mr. MCCLORY. Do you think that should possibly be covered in another piece of legislation?

Mr. WEBSTER. Possibly so. It might confuse the issue because of the numbers involved.

Mr. MCCLORY. Is there any reason why we shouldn't include foreigners? By letting claimants be anyone who has a right under the Constitution, we could inadvertantly include foreign agents and

they might claim damage because you wiretapped on them or harassed them by tailing them.

Is there any reason why we should not give them rights similar to those of other citizens?

Mr. WEBSTER. There, again, it is a policy judgment.

Mr. MCCLORY. Thank you very much for your testimony.

Bob, I hope you will come back. We will go into the 5-minute rule and there is no inhibition against our remaining. We will have a general debate, I meant to say.

Mr. DANIELSON. Mr. Kindness?

Mr. KINDNESS. Judge Webster, thank you for your testimony this morning. I appreciate the chance to ask questions. I would like to ask you about the theory behind the provision in H.R. 2659 allowing a fine of up to 1 month's compensation against former employees, who choose to have the Government substituted as the defendant.

I can't see it in terms of the ordinary disciplinary principles that would apply to an active employee. It seems to me more in the nature of a contractual undertaking.

It is either that or some legal theory that just entirely escapes me.

Do you have any comment in that area?

Mr. WEBSTER. Well, it is my understanding that those provisions were added to accommodate the concerns of those who questioned the adequacy of the disciplinary procedures to deal with the conduct of agents, and the argument was made that we would not reach the fellow who was ready to leave anyway and who left or who left rather than be disciplined.

My concern in lending my support to the bill was that whatever we did for former agents, it should be equivalent to what we would do for active agents, no more and no less, that we not overpenalize them but try to gain for them the same protection that the law affords.

If they are going to get the same protection, then they probably should be willing to subject themselves to the same type of discipline that would be available had they stayed in the Bureau rather than leaving it.

So I think it was an attempt to accommodate competing interests. Of course, they do have the option. If they don't like the option, they have the right to elect to remain in the suit as an individual defendant and not be subject to any form of agency discipline.

Mr. KINDNESS. Thank you.

I would suggest, Mr. Chairman, that we have to look somewhat more closely at the language in that part of the bill because I think, in fact, what we are doing is trying to establish something in the nature of a contractual relationship with conditions that would be statutory conditions.

Mr. DANIELSON. If you would yield, I would like to interrupt for a minute off the record.

[Discussion off the record.]

Mr. DANIELSON. Back on the record.

Mr. Director, frankly, I have no more questions. Your statement is succinct, to the point, and totally understandable. I understand

it. I have only one concern and that is that we have some safeguards against the frivolous institution of disciplinary inquiries against Government employees.

The bill brings about a machinery which enables a complaining person to make a complaint, but can that be abused, and is there some way we could try to prevent the abuse?

Mr. WEBSTER. Well, we have the mechanism that he has to prevail in order to have the full right to do it. We might permit him to come in as an invitee and participate under the bill in order to head off a second disciplinary proceeding down the road.

Mr. DANIELSON. I am going to make a suggestion. I understand your statement and I am confident that everyone does here. I wish you would put your own and the minds of your better advisers to work.

I have one lingering concern. Are we creating some small-scale Frankenstein here which will permit vindictive people to institute agency inquiries and cases where they should not be instituted, frivolously and for the purpose of harassment.

I would like to avoid that if we possibly can. It is a concern which I have. I know there are other people here within the sound of my voice who may give me some response on that later on. That is the thing. I think we have to protect the rights of the people for redress of the wrongs against them, but we also have to protect the rights of some other American people, the Government employees for unnecessarily frivolous and vindictive actions instituted against them.

Mr. WEBSTER. Mr. Chairman, this has been a primary concern of mine throughout the evolution of this bill. I would be glad to respond to that by way of letter, and I volunteer to return in the future if there is anything that comes up.

Mr. DANIELSON. I think your time is more valuable than that. If we need your personal presence, we will ask for it.

Thank you very much. I hate to act like I am in a hurry, but I am.

The subcommittee will stand in recess.

[Whereupon, at 10:22 a.m., the subcommittee recessed.]

AMENDMENT OF THE FEDERAL TORT CLAIMS ACT

WEDNESDAY, JULY 18, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10:25 a.m., in room 2226, Rayburn House Office Building, Hon. George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Mazzoli, Hughes, and Kindness.

Also present: William P. Shattuck, counsel; James H. Lauer, Jr., assistant counsel; Alan F. Coffey, Jr., associate counsel, and Florence McGrady, clerk.

Mr. DANIELSON. The hour of 10 o'clock having arrived, the subcommittee will come to order.

We will continue with taking testimony with respect to the bill, H.R. 2659, to provide amendments to the Federal Tort Claims Act. This morning we have four witnesses scheduled.

It is my understanding that they all wish to appear as a panel. If that is correct, will you all come forward? If it is not correct, speak now or forever hold your peace.

Mr. Harrington, as I understand it, wants to be present and available to answer questions, but had no statement he wished to present. As of last night I had received statements from two of you gentlemen, so I am going to recognize you in that order.

We have a statement from Mr. Ordway P. Burden, president of the Law Enforcement Assistance Foundation.

Sir, you are recognized. I am going to add that without objection your statement will be received in its entirety and you are now free to proceed in whatever manner you like.

TESTIMONY OF ORDWAY P. BURDEN, PRESIDENT, LAW ENFORCEMENT ASSISTANCE FOUNDATION; JOHN S. McNERNEY, NATIONAL PRESIDENT, FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION; SIDNEY BUTTERFIELD, EXECUTIVE DIRECTOR, ASSOCIATION OF FEDERAL INVESTIGATORS; GLEN R. MURPHY, DIRECTOR, BUREAU OF GOVERNMENTAL RELATIONS AND LEGAL COUNSEL, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE; AND JOHN HARRINGTON

Mr. BURDEN. Thank you, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF ORDWAY P. BURDEN, PRESIDENT, LAW ENFORCEMENT ASSISTANCE FOUNDATION, CHAIRMAN, NATIONAL LAW ENFORCEMENT COUNCIL

Mr. Chairman, my name is Ordway P. Burden. I am a private citizen whose lifetime interest has been in the field of law enforcement. While I reside officially in the New York City, at 250 East 87th Street, I do maintain an apartment here and divide my time between the two cities. My principal interest is in assisting the law enforcement organizations. I serve on their boards and committees and in any way personally that my Foundation and time will allow.

I am also the founder, President, and a Director of the Law Enforcement Assistance Foundation, established in 1977 to improve the quality and effectiveness of law enforcement throughout the United States. LEAF does this by focusing on educating citizens in methods of deterring and preventing crime and on fostering communication and cooperation among law enforcement agencies and organizations.

Last November I invited the principal law enforcement organizations to band together as the National Law Enforcement Council for purposes of meeting and discussing mutual interests and problems. The Council agreed to meet monthly. I was elected chairman of this group of eight national law enforcement organizations—Association of Federal Investigators, Law Enforcement Assistance Foundation, Americans for Effective Law Enforcement, Society of Former Special Agents of the FBI, Fraternal Order of Police, International Union of Police Associations, the Federal Criminal Investigators Association, and the International Association of Chiefs of Police. Some of the executives of these organizations are sitting here today as a member of this panel to offer their suggestions for improving the Tort Claims Bill.

I am grateful for your invitation to appear before the subcommittee to offer some observations and general suggestions on ways to improve the bill pending before you to amend the Tort Claim Act (H.R. 2659). This legislation would relieve the Federal law enforcement officer from liability for constitutional torts and make the government the exclusive defendent in all torts suits involving government employee's executing the responsibilities for which they are paid.

This legislation amending title 23 of the United States Code also provides a procedure for persons injured by a constitutional tort to initiate and participate in a "disciplinary inquiry" against the government employee.

As a private citizen I cannot come before you with personal experience gained from being an employed fedeal law enforcement officer, or other Federal employee. But, in my capacity and experience as a private citizen who has been deeply interested and personally involved with the law enforcement field since my college days, I feel I do have certain experience and background from which to offer some opinions that might be of interest to this subcommittee.

I have observed the need for some fair protection for the law enforcement officer from certain forms of harassment by law suits from people alleging a violation of their rights.

It is my personal belief that this bill goes too far in providing the plantiff or private citizen his right to sue the law enforcement officer for what is often alleged but very seldom proved, that the officer overstepped his bounds. The plantiff charges that his or her rights were violated when more often than not this is not proven.

Under the provisions of these amendments to the act, government in defending its agents in the conduct of their charged responsibilities could not use the "good faith defense".

A large number of those suits found to be frivolous are nothing more than harassments. No one can deny that the law enforcement officer needs to have protection against undue harassment. They get enough simply by walking up to many citizens. Many of us become very indignant when a law enforcement officer approaches us, asks for our drivers licenses, or otherwise questions us about a possible violation of the law. Many will threaten or actually bring a law suit even when not warranted.

This bill, under the present language, would make it far easier than it is now for a private citizen to bring a law suit against the law enforcement officer. This is not helping our law enforcement people, but rather is making it even more difficult for them to pursue their duty to protect us and uphold the laws. Denying the use of the "good faith defense" to the officer takes away his protection against undue harassment by the citizens he is employed to protect.

The law has become very complicated indeed. Most citizens, and many law enforcement officers, and, I dare say, many lawyers as well, not to mention judges, have difficulty understanding where the lines are drawn between proper and improper conduct on the part of the law enforcement officer. Such officers should not be placed under the constant pressure of having to guess correctly in the heat of

duty, on the front lines, to the point where even good faith errors can result in bankrupting personal liability or, even if the officer has no financial liability, then in loss of status or whatever resulting from the harm done the Agency by the Governement's inability to raise the good faith defense. In short, we cannot expect our law enforcement officers to have to make, at their peril, the kind of good faith judgment that even judges cannot agree upon.

There is another point that bothers me. Most of the law enforcement officers with whom I have discussed this at our Council meetings, are concerned about the language in the bill covering the appeal of any disciplinary action by the officer's administrative head. The language says the Attorney General "must" forward a complaint against the law enforcement officer, even if a determination has been made, for ". . . further administrative investigation or disciplinary action as may be appropriate.

What does this mean? It means that an "aggrieved party" may appeal any decision that does not suit him. An example: if a plaintiff brings a complaint against an officer, and the administrative head, after fully investigating the charge, finds the officer not guilty of any alleged offense, the party may still take his case to the federal courts, all the way to the U.S. Court of Appeals. This provision of the bill allowing such generous appeals procedure could involve the law enforcement officer in ligitation for years, even though he has been found free of any violations by his Agency or Department of government. This puts a blot on his record, and, it is costly in time and money, even though the officer may, up to a point, have the protection of legal counsel provided at government expense. The language does not provide for counsel for the defendant if the plaintiff elects to take his case into a Federal court after the charges are disposed of by the officer's appropriate administrative head.

So, it could go on and on under the language of H.R. 2659. The bill needs to be amended to:

(1) Provide for the retention of the "good faith defense";

(2) Limit the appeals procedure so that the disciplinary action taken by the law enforcement officer's Agency or Department of government can be final; or, if not final, then provide free legal counsel to the officer.

These are just a few suggestions, Mr. Chairman. I know that my colleagues in the law enforcement field have more personal, and more specific examples to support their concerns about this bill. I have offered my comments as a private citizen, a citizen who has worked closely with the law enforcement community for a number of years, and one who does understand the genuine concerns the officer has with the provisions of this legislation.

I thank you for the privilege of testifying on this bill. I would be happy to answer questions, bearing in mind that I am not a law enforcement officer. My status is that of a private citizen.

As I am a private citizen, I might add, I appreciate the point of view of the citizen as well as that of the officer. As a citizen, who believes in liberty as well as in safe streets, I tell this subcommittee that I would be willing to see this bill amended as I have suggested, as I think it would be a proper and reasonable balance between the need to protect the citizen's rights and the need to protect the officer and allow him to discharge his duties in good faith and in a professional and effective manner.

Mr. BURDEN. I will not read the entire statement. I would like to read certain sections explaining what I am doing here and why this panel has been formed as a group.

I am a private citizen whose lifetime interest has been in the field of law enforcement.

While I reside officially in New York City, at 250 East 87th Street, I do maintain an apartment here and divide my time between the two cities. My principal interest is in assisting the law enforcement organizations. I serve on their boards and committees and in any way personally that my foundation and time will allow.

I am also the founder, president, and a director of the Law Enforcement Assistance Foundation, established in 1977 to improve the quality and effectiveness of law enforcement throughout the United States. LEAF does this by focusing on educating citizens in methods of deterring and preventing crime and on fostering communication and cooperation among law enforcement agencies and organizations.

Last November I invited the principal law enforcement organizations to band together as the National Law Enforcement Council for purposes of meeting and discussing mutual interests and problems.

The council agreed to meet monthly. I was elected chairman of this group of eight national law enforcement organizations: Association of Federal Investigators, Law Enforcement Assistance Foundation, Americans for Effective Law Enforcement, Society of Former Special Agents of the FBI, Fraternal Order of Police, International Union of Police Associations, the Federal Criminal Investigators Association, and the International Association of Chiefs of Police.

Some of the executives of these organizations are sitting here today as a member of this panel to offer their suggestions for improving the tort claims bill.

I am grateful for your invitation to appear before your subcommittee to offer some observations and general suggestions on ways to improve the bill pending before you to amend the Tort Claims Act, H.R. 2659. However, I am not a lawyer and do not consider myself an expert on the legislation.

My role here was to assemble the panel and to bring together the men who will be most directly affected by the legislation, the representatives of the Federal law enforcement community and also representatives of local law enforcement who might be affected by future legislation at the State level.

I would prefer to act in referral of your questions to the other members of the panel sitting with me here rather than answering directly.

Mr. DANIELSON. Thank you very much.

In reading your statement, I observed, and just so the record will be complete, you state that you are not a law enforcement officer and apparently have never been, but you have a deep and abiding interest in law enforcement.

Will you tell us, what is your principal calling?

Mr. BURDEN. I am an investment banker, a partner in the firm of William A. Burden in New York City.

Mr. DANIELSON. I am glad to hear that. It is good to have somebody who has another ace in the hole to finance his public interest. More power to you.

Mr. Kindness, this gentleman is Mr. Ordway Burden of the Law Enforcement Assistance Foundation whose statement has been received in the record.

You state on page 3 of your statement that the bill goes too far in providing the, you call it plaintiff or private citizen, his right to sue the law enforcement officer.

Will you expand on that just briefly, please?

Mr. BURDEN. What I mean by that is the fact that after the administrative decision has been made, the aggrieved party has the right to continue with his complaint through the administrative agency up through the various Federal courts.

Mr. DANIELSON. You are really referring to the disciplinary procedure rather than a lawsuit?

Mr. BURDEN. Right, not the initial lawsuit because the United States is the party defendant for the initial lawsuit.

Mr. DANIELSON. I take it from your statement that you support the idea of having the Government be the sole party defendant?

Mr. BURDEN. Yes; I do.

What I am concerned about really is the disciplinary aspect of the legislation and also the abandonment of the good faith defense which means that even though there is no financial liability for the law enforcement officer, there is a blot on his record if the plaintiff carries the case.

Mr. DANIELSON. And it is your opinion that removal of the good faith defense, are we talking about the lawsuit or the disciplinary proceeding?

Mr. BURDEN. I was talking about the initial lawsuit. I don't believe it is available in the disciplinary proceeding, is it?

Mr. DANIELSON. I was trying to see what you are talking about here. The officer would not be a party defendant in the lawsuit.

Mr. BURDEN. I understand that. The United States is the party defendant.

Mr. DANIELSON. So it could not be used as a harassment to the officer.

Well, he would have to be available to appear as a witness, but that would not be too bad.

Mr. BURDEN. I think it would be a blot on his record as far as agency files are concerned.

Mr. DANIELSON. I don't know. I have tried a lot of lawsuits over a lot of years. I don't associate being a defendant, or a plaintiff for that matter, as a kind of blot on the record.

Mr. BURDEN. Perhaps Mr. McNerney would have a comment on that.

Mr. DANIELSON. I will call on him when I conclude with your examination, or we will, I should say.

You also commented that you have concern about the provisions in the bill which would relate to the appeal of disciplinary action by the officer's administrative agency head.

Mr. BURDEN. The appeal of the disciplinary action would be by the plaintiff, in other words, the aggrieved party.

Mr. DANIELSON. You comment that that concerns you.

Mr. BURDEN. Yes.

Mr. DANIELSON. What is your attitude on that?

Mr. BURDEN. I feel that this drags on the action for probably years to be a sword of Damocles over the officer's head. I think the matter should be resolved within the agency. I think the discipline there is adequate.

Mr. DANIELSON. Would you make your comment with respect to the right for counsel by the officer, whether it be in court or in disciplinary procedures?

Mr. BURDEN. Yes; I think that should be supplied.

Mr. DANIELSON. When you say supplied, the right to have counsel or should counsel be made available?

Mr. BURDEN. I think counsel should be made available.

Mr. DANIELSON. At public cost?

Mr. BURDEN. At public cost.

Mr. DANIELSON. I have no further questions.

Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Gentlemen, I apologize for not being here at the beginning of the hearing this morning.

Mr. Burden, I would like to ask your thoughts on something that—I should explain, by the way, that I have had the opportunity to go over the statements in advance and thus I hope I have not missed too much in the content of the testimony here.

But I believe there is an area, Mr. Burden, in which your statement doesn't offer a particular thought and I would like to elicit your thoughts in this area, and that is regarding class action lawsuits.

H.R. 2659 would authorize class action lawsuits where constitutional torts are involved. I note the rising incidence of class action lawsuits in our society, in our courts.

In general I have some concern, not as a practicing lawyer anymore but as one who used to. I elicit your views about providing specifically for class action lawsuits in the bill, H.R. 2659.

Mr. BURDEN. I would be opposed to that type of provision. I think it provokes additional litigation, prolongs existing litigation. I think it almost encourages plaintiff shopping. I don't think it provides the kind of disciplinary enforcement that the bill should include.

Mr. KINDNESS. One of the concerns that I have in this bill is that we are talking about something very personal that is to be established by a citizen. Supposedly or allegedly, he has incurred some kind of personal damage, perhaps no damage other than reputation, because of a constitutional tort.

It seems to me to be inconsistent with the concept of that very personal right and injury to provide for a class action lawsuit in which enterprising lawyers could go out and find a class, identify it, and find himself or herself in a position to gain income and build a career on the basis of such a class action lawsuit.

The inconsistency, it seems to me, is class action on the one hand seems foreign to the basis of the bill. It is a very personal right we are talking about being established by the individual, who becomes a plaintiff in a civil action, and perhaps then subsequently brings about a disciplinary proceeding, too.

In the matter of appeal of disciplinary proceedings, which the chairman was exploring with you a few moments ago, I wonder if you would give me your thoughts in response to this question:

The disciplinary proceedings in any and all governmental agencies are designed, as I understand it, to protect the public interest and at the same time to preserve the rights and interests of the individual employee.

I perceive an unwillingness to accept the adequacy of existing disciplinary procedures by the proponents of H.R. 2659. It goes so far as to not only provide for a complaint and a possible second disciplinary proceeding, but also victim participation all the way through to an appeal of those disciplinary results in a circuit court.

Would you like to comment upon about the adequacy of current disciplinary procedures? Do you perceive that they are inadequate?

Mr. BURDEN. Not at all. On the contrary, we had unanimous agreement among the members of the council that the existing disciplinary procedures were adequate. I am certain if you ask the

two gentlemen here representing Federal organizations, they will underline that view.

We feel that existing disciplinary procedures are, if anything, too stringent in some cases. We don't feel the additional appeals procedures is necessary.

Mr. KINDNESS. I note in your testimony you indicate a need for the right to counsel on the part of the Federal employee at all stages in the disciplinary proceedings, including the FBI.

Would you respond to this question, please? At the present time, the FBI does not provide the opportunity for counsel, and in the case of nonveterans, they sort of serve at will, in effect, of the Director.

Is this an undesirable situation as presently exists in your view or does it only come into focus, that is the right to counsel, does it only come into focus because of the provisions of H.R. 2659?

Mr. BURDEN. I do not have sufficient expertise about the internal workings of the FBI to be able to answer that question objectively. I believe Mr. Butterfield was with the FBI for several years.

Mr. BUTTERFIELD. Yes; I was, but not recently.

Mr. BURDEN. So I don't feel qualified to answer the question.

Mr. KINDNESS. Thank you.

Mr. DANIELSON. Thank you.

Mr. Hughes of New Jersey.

Mr. HUGHES. Thank you. I have no questions.

Mr. DANIELSON. Thank you, Mr. Burden. We will possibly get around to asking you more questions.

The next statement which we have received is that of John S. McNerney of the Federal Criminal Investigators Association.

Your statement will be received in its entirety in the record.

[The prepared statement of Mr. McNerney follows:]

STATEMENT OF JOHN S. MCNERNEY, NATIONAL PRESIDENT, FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION

Mr. Chairman and members of the subcommittee, we appreciate the opportunity to appear before you this morning to express our views concerning this most important piece of legislation, and to explain why we object to the passage of H.R. 2659, in its present form.

The organization is the only professional association composed exclusively of Federal criminal investigators. Our membership rolls include the Federal Bureau of Investigation, Internal Revenue Service (Criminal Investigative and Internal Security Divisions), U.S. Secret Service, U.S. Customs, Post Office Inspection Service, Immigration and Naturalization Service, Bureau of Alcohol, Tobacco and Firearms, U.S. Marshals Service and U.S. attorneys to mention a few. Every member of this association is vitally interested in this bill and its ultimate passage. Our associates from the Americans for Effective Law Enforcement, International Association of Chiefs of Police, International Conference of Police Associations, Law Enforcement Assistance Foundation, Fraternal Order of Police, and Association of Federal Investigators are also extremely interested in this legislation.

All of the above organizations who are members of the National Law Enforcement Council, join the Federal Criminal Investigators Association in support of the overall purpose of this legislation and feel that it deals with the basic problem that has been left unattended for so many years. Law enforcement was very happy that this legislation was finally introduced because: (1) it would relieve them of a personal liability that is not and should not be theirs; (2) it would raise the morale of every Federal law enforcement officer; and (3) it would increase their efficiency and provide them with the incentive to be the vigorous enforcement officers the public wants.

In the event of a civil suit of a Federal employee, three people stand to lose. The plantiff in the action finds that he is unable to have his judgment satisfied because the defendant does not have sufficient money or assets. The defendant loses because

he has had what little he has been able to save taken away from him and is faced with heavy legal expenses. The public loses because they now have a less than vigorous law enforcement officer who will weigh every move in the future as will his brother officers.

H.R. 2659 can correct all of these inequities and keep our Federal law enforcement system the strong, courageous and vigorous service the American public has a right to expect. Our members, freed of the worry of civil suits with the attendant large judgments, liens, and legal bills, would then be able to perform their jobs with peace of mind and maintain the outstanding reputation that Federal law enforcement has built up over the years.

It is, indeed, unfortunate that the Department of Justice did not see fit to consult the law enforcement organizations before it capitulated to the demands of the many special interest groups when it amended H.R. 9219 and S. 2117 during the 95th Congress. The amendments have so changed the original intent, that the bills currently before the House and Senate Judiciary Committees are no longer palatable to the Federal criminal investigators and the National Law Enforcement Council.

Just recently, we met with a high level member of the Department of Justice at our request, who treated our concerns with great indifference and dismissed us by saying, "I will be glad to receive anything you care to submit, but it will not change anything."

We are deeply concerned about the following provisions of the bill:

1. *Good faith defense.*—We feel that the bill does not spell out whether or not this defense would be available to the agent in any disciplinary proceeding.

2. *Notice to employee.*—There is no provision for giving notice to the employee that any type of action has been taken against him or that such action has been terminated. The bill only mentions that the plaintiff shall be notified.

3. *Definition of "Under Color of Office."*—We feel that this terminology is very ambiguous and should be more clearly defined.

4. *Right to counsel.*—The bill should spell out what rights the employee has to be represented by counsel during any administrative or judicial proceeding and whether or not he has the right to present evidence and cross examine any witnesses against him. The bill only deals with the rights of the plaintiff.

5. *Appeal rights.*—This bill spells out all of the rights of the plaintiff, but fails to state what rights of appeal the agent has. Our members from the FBI, who are not veterans, have no right of appeal. We feel that the right of appeal by all employees should be clearly defined and nothing left to chance. The careers of many employees could be jeopardized by a misunderstanding.

6. *Delay in hearings.*—The disciplinary hearings should be held as soon as possible after the event has taken place. It makes no sense to await the outcome of the settlement before such action is taken. The career of the defendant-employee is "on the line".

7. *Disciplinary hearings.*—The original bill (H.R. 9219) called for one disciplinary hearing, but, special interest groups who desire to hold the employees feet to the fire have prevailed with the Department of Justice. It makes no sense to have two disciplinary hearings by two different agencies at two different points in time, with the ultimate possibility of a judicial review.

Our members are in an occupational area that makes them prime targets for frivolous suits that could result in sizeable judgements that would strip them of their few assets and leave them with legal debts that they could never hope to satisfy. Needless to say, being in such a high risk area has caused our members to be extremely cautious and as a result, we do not have the vigorous and aggressive law enforcement community we once had.

We ask that the "good faith" defense available to employees at the present time be made available to the United States Government since it would become the exclusive defendant in our place. The United States Government should not be entitled to any less defense than if the employee was the exclusive defendant. Elimination of the "good faith" defense would be tantamount to admitting liability on the part of the employee and would place him in a precarious position in the suggested administrative proceedings.

We agree that circumstances and/or situations could arise which might call for disciplinary action of an employee. We cannot, however, agree that this type of conduct should be subjected to an administrative proceeding by the alleged tort victim to determine whether or not disciplinary action is called for. Neither should so-called "civilian review boards" become a part of this program. During the employee's tenure in office, he is subjected to the discipline of his employer. A tortious constitutional injury should require no more.

Since the purposes of the amendment to the Tort Claims Act is to remove the threat of an employee being held liable for large judgements, then permitting the alleged tort victim to have a say in the disciplinary proceedings will "wipe out" the protection sought to be given and place the employee in a very tenuous position. Such a provision would hardly be conducive to improved employee morale.

We want to go on record, that all of our members are dedicated and extremely hard-working employees who perform their duties in a highly professional manner and are loyal to their government. We are in complete agreement with the attorney general and feel that any employee who may intentionally violate the constitutional rights of another should be held accountable to his employer for his actions.

We suggest the following changes be made to H.R. 2659:

1. The good faith defense be made available to the individual officer without restriction and spelled out in clear and concise language that it applies to all disciplinary and judicial hearings.
2. In any disciplinary or judicial procedure, the defendant employee should have the absolute right to counsel. It should state that such right is available to all employees.
3. One disciplinary hearing be held and that by the agency employing the defendant-employee.
4. The disciplinary hearing be held no later than 60 days after the original complaint has been filed by the plaintiff.
5. The individual officer should have the right to appeal any disciplinary action and it should state that all agents of the Federal Bureau of Investigation have the same right of appeal.
6. The term "under color of office" be defined so that there will be no misunderstanding or misconception in determining what is meant.
7. A statement be contained in the bill giving the employee notice when a complaint is filed against him and also when all action has been terminated.

I feel sure that someone is going to tell me that some of these items are incorporated in the present bill, however, in my 40 years of government service, I have heard and been advised, "that was not the intent of Congress." I want to make sure that such cannot be said about any part of H.R. 2659.

Some of the statements presented by other interested groups have stated, intimated and inferred they do not believe that agencies would be willing to take meaningful disciplinary action against their employees. This sort of thinking proves "that a little knowledge is a dangerous thing." I spent 40 years as an employee of the United States Government, and I have never found a supervisor or manager or agency head who was afraid of or lacked a willingness to take disciplinary action against an employee. Those people, who have never worked for the government, are living in a fool's paradise when they believe that government employees live in a world of milk and honey. After 40 years as a government employee, I would say "Try it. You probably won't like it." Any employee that causes his agency to be the subject of adverse publicity is "dead". He can expect a transfer to a less than desirable post of duty and can forget about a promotion. To believe that his agency will not come down hard on the employee is ridiculous.

Further, how can we give credibility to such a statement now that Congress recently passed a law revising the Civil Service laws which incorporate therein the provisions that upper level management is to be held strictly accountable for the actions of their agency.

Thank you for permitting me to testify. I shall be glad to answer any questions.

Mr. McNERNEY. Thank you, Mr. Chairman.

I am not going to read all of my statement, but I have some pertinent points I would like to reemphasize.

First of all, I would like to thank the subcommittee for permitting me to appear before you this morning to express the views of our association concerning what we feel is a very, very important piece of legislation.

I would like to give a brief rundown of our association. It is the only professional association composed exclusively of Federal criminal investigators.

Our membership rolls include the Federal Bureau of Investigation; the Internal Revenue Service, that is the Criminal Investigative and Internal Security Divisions; U.S. Secret Service; U.S. Customs; Post Office Inspection Service; Immigration and Naturaliza-

tion Service; Bureau of Alcohol, Tobacco, and Firearms; U.S. Marshals Service, and U.S. Attorneys, to mention a few.

Every member of this association is vitally interested in this bill and its ultimate passage in a form that we feel would be palatable.

In the event of a civil suit of a Federal employee, three people stand to lose:

The plaintiff in the action finds that he is unable to have his judgment satisfied because the defendant employee does not have sufficient moneys or assets.

The defendant loses because he has had what little he has been able to save taken away from him and is faced with heavy legal expenses.

The public loses because they now have a less than vigorous law enforcement officer who will weigh every move in the future as will his brother officers.

H.R. 2659 could correct all of these inequities and keep our Federal law enforcement system the strong, courageous and vigorous service the American public has a right to expect.

We are deeply concerned about the following provisions of the bill:

One, the good faith defense. We feel the bill does not spell out whether or not this defense would be available to the agent in any disciplinary proceeding?

Two, there is no provision for giving notice to the employee that any type of action has been taken against him or that such action has been terminated. The bill only mentions that the plaintiff shall be notified.

Three, definition of color of office. We feel that this terminology is very ambiguous and should be more clearly defined in the bill.

Four, right to counsel. The bill should spell out what rights the employee has to be represented by counsel during any administrative or judicial proceeding and whether or not he has the right to present evidence and cross-examine any witnesses against him. The bill only deals with the rights of the plaintiff.

I would like to say as an aside that law enforcement agencies do not permit the present time employees in any disciplinary action to be represented by counsel.

Five, appeal rights. The bill spells out all of the rights of the plaintiffs, but fails to state what rights of appeal the agent has. Our members from the Federal Bureau of Investigation who are not veterans have no right of appeal.

We feel the right of appeal by all employees should be clearly defined and nothing left to chance. The career of all employees could be jeopardized by misunderstanding.

Six, delay in hearings. Disciplinary hearings should be held as soon as possible after the event has taken place. It makes no sense to await the outcome before such action is taken. The career of the employee is on the line.

Seven, disciplinary hearings. The original bill in the 95th Congress, H.R. 9219, calls for one disciplinary hearing, but special interest groups who desire to hold the employee's feet to the fire have prevailed with the Department of Justice.

It makes no sense to have two disciplinary hearings by two different agencies at two different points in time, with the ultimate possibility of a judicial review.

We ask that the good faith defense available to the employees at the present time be made available to the U.S. Government since it would become the exclusive defendant in our place.

The U.S. Government should not be entitled to any less defense than if the employee was the exclusive defendant. Elimination of the good faith defense would be tantamount to admitting liability on the part of the employee and would place him in a precarious position in the suggested administrative proceedings.

We agree that circumstances and/or situations could arise which might call for disciplinary action of an employee. We cannot, however, agree that this type of conduct should be subjected to an administrative proceeding by the alleged tort victim to determine whether or not disciplinary action is called for.

Neither should so-called civilian review boards become a part of this program. During the employee's tenure in office, he is subjected to the discipline of his employer. A tortious constitutional injury should require no more.

Since the purposes of the amendment to the Tort Claims Act is to remove the threat of an employee being held liable for large judgments, then permitting the alleged tort victim to have a say in the disciplinary proceedings will "wipe out" the protection sought to be given and place the employee in a very tenuous position. Such a provision would hardly be conducive to improved employee morale.

We suggest the following changes be made to H.R. 2659:

One, the good faith defense be made available to the individual officer without restriction and spelled out in clear and concise language that it applies to all disciplinary and judicial hearings.

I might also add that this also be available to the U.S. Government as the alter ego of the employee in the original complaint.

Two, in any disciplinary or judicial procedure, the defendant employee should have the absolute right to counsel. It should state that such right is available to all employees.

Three, one disciplinary hearing be held and that by the agency employing the defendant-employee.

Four, the disciplinary hearing be held no later than 60 days after the original complaint has been filed by the plaintiff.

Five, the individual officer should have the right to appeal any disciplinary action and it should state that all agents of the Federal Bureau of Investigation have the same right of appeal.

Six, the term "under color of office" be defined so that there will be no misunderstanding or misconception in determining what is meant.

Prior to writing my testimony, I conferred with two or three U.S. attorneys and I received two or three different conceptions of what the term "under color of office" meant.

Seven, a statement be contained in the bill giving the employee notice when a complaint is filed against him and also when all action has been terminated.

I feel sure that someone is going to tell me that some of these items are incorporated in the present bill. However, in my 40 years

of Government service, I have heard and been advised, "That was not the intent of Congress." I want to make sure that such cannot be said about any part of H.R. 2659.

Some of the statements presented by other interested groups have stated, intimated and inferred they do not believe that agencies would be willing to take meaningful disciplinary action against their employees. This sort of thinking proves that a little knowledge is a dangerous thing.

I spent 40 years as an employee of the U.S. Government, and I have never found a supervisor, or manager, or agency head who was afraid of or lacked a willingness to take disciplinary action against an employee. Those people, who have never worked for the Government, are living in a fool's paradise when they believe that Government employees live in a world of milk and honey. After 40 years as a Government employee, I would say: "Try it, you probably won't like it."

Any employee that causes his agency to be the subject of adverse publicity is dead. He can expect a transfer to a less than desirable post of duty and can forget about a promotion. To believe that his agency will not come down hard on the employee is ridiculous.

Further, how can we give credibility to such a statement now that Congress recently passed a law revising the civil service laws which incorporate therein the provisions that upper level management is to be held strictly accountable for the actions of their agency.

Thank you for permitting me to testify. I shall be glad to answer any questions.

Mr. DANIELSON. Thank you very much, Mr. McNerney.

First of all, I want to comment on the very last thing you said which was also said by Mr. Burden. You thanked us for permitting you to testify. You have it backward. We thank you for testifying.

I don't know how we can expect to meet our responsibilities without the help of the citizens who have knowledge of the subject matter and who are concerned enough to give us some of their time.

After that, I yield to the gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. McNerney, in attempting to define the term "under color of office", I have a little bit of conceptual difficulty. It seems to me that your suggestion is a good and desirable one, but I wonder if you have any thoughts, any yardsticks, guidelines, or what have you, that you would suggest specifically as being things we ought to think about including in the definition of "under color of office". That is, could you refer us to any sources that you think are appropriate for some help in that respect because I am quite interested in trying to limit and define that term.

Mr. MCNERNEY. Congressman Kindness, in discussing this I came across one thought that I might have and this is a situation that is rather on the fence.

You are on a closed surveillance as opposed to an open surveillance in a particularly bad neighborhood. The individuals of that neighborhood who are all streetwise will notice a car with two gentlemen, well dressed presumably, and the first thing you know,

they smell a rat and they start hanging around the automobile for the purpose of trying to burn you.

There are situations when I have seen an agent pull his gun out and have to pull his gun out in order to threaten these individuals to get away from the car so they don't burn the surveillance.

There are two times that a Federal law enforcement officer should pull his gun, in defense of himself or another person. This could be under the terms of his employment, but also could be interpreted as not under terms of his office because his employee, the agency, would take a dim view of such action.

Mr. KINDNESS. When you refer to burning the surveillance, you mean destroy the effectiveness of the function that is being performed?

Mr. MCNERNEY. That is right. After you have been sitting on a place for maybe 3 months, it is not the nicest thing in the world to have a surveillance burned on you at the last minute.

Mr. KINDNESS. Are there any sources that you would suggest as to ways to get further examples of definitions?

Mr. MCNERNEY. Well, I really don't know, Congressman. I think that in the testimony of Mr. Civiletti, this matter was brought up. I think even some members of the committee have had some concern about this.

Mr. DANIELSON. Would the gentleman yield briefly?

Mr. KINDNESS. Sure.

Mr. DANIELSON. When this bill was before the 95th Congress, I did request and obtain from the Department of Justice a letter dated July 18, 1978, which in effect set forth their concept of good faith, concept of color of office.

I have written to the Attorney General since this bill came into being and submitted a copy of that letter of July 18, 1978, and have requested that they give us any additional comment that they may have or point out any differences that they may have.

I have not yet had the reply, but it will be available and will go into the record. Meanwhile, I will see to it that you get a copy of the Justice letter of July 18, 1978.

Mr. KINDNESS. Thank you, Mr. Chairman.

I, of course, feel we need to strike out and look around to all useful sources for ideas as to what to do in this area. But I, up to this point, don't have a great deal of confidence in the positions that have been taken by the Department of Justice on a number of aspects in this bill.

So I am looking desperately for some other thoughts and expressions in this, too, to help balance our approach.

Another matter possibly needing definition is that of the good faith defense. As a general proposition, do you believe that it is desirable for us to make an attempt to define the good faith defense, and perhaps so limit it in language that it might be agreeable to all the various interests concerned? For example, we could make the good faith defense available to the Government as well as to the Federal employee in the disciplinary proceedings, but limit its applicability to sort of clear-cut cases rather than leaving this for the definition of the courts.

My question in short is: Should we try to define the good faith defense and perhaps limit it so that it then might be acceptable for

it to be included in the bill as available, the defense of the United States?

Mr. McNERNEY. I would agree that the good faith defense should be spelled out in as great a detail as possible. To limit it, that would depend upon the area that it would be limited to.

Mr. KINDNESS. In both of these areas, good faith defense and under color of office I would say this: I would welcome any thoughts, whether today or subsequently, from any of our panel of witnesses, any help that might be afforded in arriving at satisfactory definitions of those terms. That would certainly be appreciated.

Mr. McNERNEY. We will be glad to.

Mr. KINDNESS. Mr. Chairman, I just have one other question if my time has not expired.

Mr. DANIELSON. Go ahead. We are being generous here this morning. Why not, these are good questions even if they are long and drawn out.

Mr. KINDNESS. With respect to the appeal of disciplinary proceedings by a complaining witness who has prevailed in a civil action, do you think that the bill should somehow make certain that if a class action lawsuit has been involved, then only one representative action in the disciplinary proceedings could be taken?

As the bill stands right now, as I see it, if there was a class action lawsuit, everyone in that class could get into those disciplinary proceedings and participate, including participating in an appeal. It is just an unworkable concept unless it is limited to one representative action or one person representing that class or group.

Would you have any comment in that area?

Mr. McNERNEY. Yes, I would, Congressman.

I think that—let's say we had 50 or 75 people involved in a class action suit. We would have a disorganized county fire drill in any administrative hearing with 50 to 75 people attempting to bring in witnesses, present evidence, present testimony, ask questions.

I think that if we have to have a class action situation, that in any class action situation it should be limited to one individual and let him represent the class.

Mr. KINDNESS. I have some difficulty with that from the standpoint of individual rights, of course. I just can foresee that problem arising even though the bill did not provide for class action lawsuits.

There might be a multiplicity of participants in the disciplinary proceeding. Even if there were 10 individuals who brought individual action and it was not a class action lawsuit, the case you mentioned as surveillance being destroyed or its effectiveness being destroyed by a number of individuals, they might decide, well, let's all file lawsuits.

If they indeed prevail, each one of them could be participants in the disciplinary proceeding.

Mr. McNERNEY. That is right.

Mr. KINDNESS. So you need to approach that problem in some manner so as to make reasonable a participation of complainants in a disciplinary proceeding if they are to be involved in it at all.

I thank you very much.

Mr. DANIELSON. Thank you, Mr. Kindness.
Mr. Mazzoli of Kentucky.
Mr. MAZZOLI. I have no questions, thank you.
Mr. DANIELSON. Mr. Hughes of New Jersey.
Mr. HUGHES. Thank you, Mr. Chairman.
Thank you, Mr. McNerney.
I gather your concerns fall into roughly three categories:
One, the structure of the disciplinary proceedings, that is, it be a single proceeding, you question the desirability of having the plaintiff participate in those proceedings, that right to counsel be insured in all stages of the proceeding, and that adequate notice be given of the intent to file proceedings and the termination of the proceedings. That is one area of concern.
The second deals with the good faith defense. It is your belief that the Government should have that available as well as the defendant in the disciplinary proceedings.
And, third, that the definition of color of office be encompassing to such an extent that it would cover not just the direct activities but related activities of law enforcement officers.
Does that sum up your three major areas of concern?
Mr. MCNERNEY. That is pretty concise.
Mr. HUGHES. I note you suggest that it is your hope in testifying that you want the intent of Congress made clear so we don't have the argument that that was not the intent of Congress.
I realize that hope is life eternal, but in the short time I have been around here I have concluded that we will not reach the point that we don't have arguments as to what the intent of Congress is.
But I agree with you, I think we have to do our best in trying to clarify these points and make sure that we do indeed address these various issues.
I also do not understand what you mean on page 7, item 5. You indicate individual officers should have a right to appeal any disciplinary action and should state that all agents of the FBI have the same right of appeal.
Is there some distinction, because I would assume you want the same right for all law enforcement officers?
Mr. MCNERNEY. All law enforcement officers do not have the same right of appeal. An individual in the Federal Bureau of Investigation who is not a veteran has no right of appeal, absolutely none. The only man that he might appeal to would be to the Director. He can write him a letter. That is about all. But he cannot go beyond that.
Mr. HUGHES. That same situation does not prevail with Alcohol, Tobacco, and Firearms?
Mr. MCNERNEY. No, it does not. It is unique to the FBI.
Mr. MAZZOLI. When you say veteran, you mean veteran of the armed services?
Mr. MCNERNEY. Yes, sir.
Mr. HUGHES. And that clarifies it. I didn't realize there was that distinction.
Mr. MCNERNEY. Yes, sir, that is the reason I spelled out the Federal Bureau of Investigation. We have many members who are not veterans through no fault of their own. They are placed in a very precarious position.

Mr. HUGHES. One final question, even though I don't think that it would be fair to ask you today for your definition of color of office, I would ask you to prepare one.

Mr. MCNERNEY. I wish I could give you one because I don't quite understand it myself.

Mr. HUGHES. I would invite you and your colleagues perhaps to draft what you think would be a fair and reasonable definition of color of office so that we can address the concerns indicated by Mr. Kindness. I share his concerns because the definition is somewhat illusive, and perhaps you could give some help to this committee if you would furnish us with what you think would be a good definition of color of office.

Mr. MCNERNEY. We will try to do that.

Mr. DANIELSON. I would like to state while we are on that subject that I fully agree with my friend, Mr. Kindness of Ohio, and Mr. Hughes of New Jersey, that inasmuch as we are speaking of color of office in this legislation and if it should become law, it is quite important that color of office means something.

It should not be just a concept that different people will interpret in different ways. It ought to mean something that is clear and definite and certain.

Although I did mention, and Mr. Kindness was kind enough to yield to me, that we do have an opinion letter from the Department of Justice, I certainly did not mean to imply that we would restrict our consideration to that.

Whoever having knowledge and having done enough work to make his opinion credible is certainly invited to send it in to us. Whether or not we incorporate it within the bill itself or by reference in the committee report I don't think is particularly important so long as we know what we are talking about.

But that must be defined. I think that oftentimes some of us are a little bit too modest about possibly disclosing a lack of knowledge on a subject and we fail to ask the questions which others are equally concerned about. "Color of office" has not yet been sufficiently defined in my mind at least.

Sir, on your statement there are a couple of points I will just touch upon. It was a very good statement I might add.

You state that your organization is composed exclusively of Federal criminal investigators. I would like to ask you, do you mean former Federal investigators or both former and present?

Mr. MCNERNEY. Both active and retired.

Mr. DANIELSON. Both categories?

Mr. MCNERNEY. Yes.

Mr. DANIELSON. You also state that you support the overall purpose of the legislation, but then again you state that the bill is no longer palatable. I am not quite sure what you mean. Do you feel we ought to go ahead with this or should we drop it?

Mr. MCNERNEY. Without the amendments that I suggested, I suggest that we drop it.

Mr. DANIELSON. You would feel that without good faith defense or a tailoring more adequately of the disciplinary proceedings and right to counsel, without those three, we are better off where we are today?

Mr. MCNERNEY. That is right, sir, much better.

Mr. DANIELSON. How about if we had one or two of those three, would you still feel the same way?

Mr. MCNERNEY. I would feel the same way.

Mr. DANIELSON. We won't tie you down too tightly because that is based on a hypothetical and that is pretty far removed. I do appreciate your comments.

Notice to the employee was brought out by you, sir, and also by you, Mr. Burden. You do it two times. You request that notice be given to the employee when a proceeding is started. I guess you mean by that in the broadest sense that when a complaint is lodged with the administrative agencies; is that correct?

Mr. MCNERNEY. Yes, sir, that is right.

Mr. DANIELSON. And also that there be notice when the matter is terminated?

Mr. MCNERNEY. That is right, sir.

Mr. DANIELSON. I don't offhand see any reason why that should not be made available. The bill does, as you say, make this available to the complaining person; is that correct?

Mr. MCNERNEY. That is right.

Mr. DANIELSON. It is a point that we will certainly consider in markup.

I have already touched on color of office. Right of counsel, to what extent do you feel this right should be made available, and I condition that as follows:

That the employee would have the right, if he chooses, to have counsel, but if he chooses not to have counsel, he need not have counsel? I presume you include both of those?

Mr. MCNERNEY. Yes, sir.

Mr. DANIELSON. Second, we must be talking about the disciplinary proceedings because if this bill became law, only the Government would be a party defendant, and obviously the Government would be represented by its own counsel.

I don't really see any need for the employee to have counsel in the lawsuit.

Mr. MCNERNEY. I am not referring to the lawsuit.

Mr. DANIELSON. You are talking about discipline?

Mr. MCNERNEY. I am talking about the disciplinary proceeding and the ultimate review that might be held.

Mr. DANIELSON. The gentleman in the middle, Mr. Murphy of the International Association of Chiefs of Police wants to say something.

Mr. MURPHY. Pardon me, but you see, it is appropriate to appeal the discipline by going into the courts, not just administrative hearing. Certainly the plaintiff in a suit is allowed counsel paid by, under appropriate circumstances, is allowed to be paid by the Government.

It seems to me it would only be appropriate to the defendant which would be the individual agent.

Mr. DANIELSON. All right, I have your point. I just want to restate it to be sure I fully understand what you are driving at.

In my previous comment I was thinking of the tort action, the preliminary tort action in which an injured citizen sues the United States of America for monetary damages based upon the alleged injury.

In that case, the employee would not be a party to the suit and I don't really see any need for him to have counsel.

Do you concur on that part?

Mr. MURPHY. Yes, sir.

Mr. DANIELSON. What you are talking about is the court review which might follow a disciplinary proceeding; is that correct?

Mr. MURPHY. Yes.

Mr. KINDNESS. Would you yield on that point?

Mr. DANIELSON. Surely.

Mr. KINDNESS. While we are on that topic, I would like to elicit any comments with respect to the problem that might arise in the disciplinary proceedings of the administrative authority, going on the basis of the record established in the civil suit. Again the employee may not be represented by counsel in the disciplinary proceeding.

The record established in that civil action may very well have a strong bearing on what happens in the disciplinary proceedings. This is one of the problems I perceive. I don't know the solution to it, but I do elicit any thoughts on that, however, on this topic of right to counsel.

For example, one thing that has occurred to me is that perhaps the individual employee, the law enforcement officer, maybe ought to be made a necessary party to the civil action and thus have the right to counsel in order to protect against the record becoming something that would be harmful to him in a subsequent disciplinary procedure.

Mr. HUGHES. Would the gentleman yield to me?

Mr. DANIELSON. Surely.

Mr. HUGHES. Actually, the standard approved would be different in a civil action as compared with a discipline proceeding. I would think that perhaps we could accomplish the same thing by making the record made in a civil action not admissible in a disciplinary proceeding.

It seems to me that that would be the proper way to proceed, not to provide counsel for the defendant and have the defendant participate in each stage of a civil proceeding.

I don't think it would be any different than any other quasi-criminal proceeding. The record is often not particularly relevant to the issues, in a civil proceeding.

Mr. KINDNESS. If the chairman would yield further on that, I think that may be a more practical answer to the problem. However, the nature of administrative proceedings, the lesser degree of formality of administrative proceedings is such that, generally speaking, there is cognizance of what has occurred in a civil action or another administrative action or even in a personnel action that is in the file of the employee.

Those things generally are included or allowed to be included in the consideration of the administrative decisionmaker, so that it could be very difficult to exclude on a practical level the results of the record in the civil action.

Mr. HUGHES. If the gentleman would yield, I don't know that as a matter of public policy it would be well to have a defendant as such participate in a civil proceeding. It interjects a whole host of

other issues into it, although obviously the defendant would be a witness in most cases.

I am not so sure that we are really putting or making the focus really on the suit against the Government if you permit counsel for the defendant to involve himself in a crossfire with the plaintiff.

Mr. KINDNESS. We could solve that problem by not allowing the intervention of the civil suit plaintiff in the disciplinary proceeding.

Mr. HUGHES. That is true, but we are talking about civil actions. Obviously, the plaintiff would be represented by counsel and the Government would defend the position of the Government. It seems to me you interject a whole host of other issues into it if you provide for the representation by the defendant in that particular civil proceeding.

It is not unusual, for instance, just as in other civil litigation, to have a defendant object, for instance, to a settlement of the case since it involves money damages.

I would think that it would interject all kinds of collateral issues if you encourage in some fashion representation by plaintiffs, too. I think we can solve the problem that the gentleman is concerned about by perhaps not making the record made in a civil case admissible in a disciplinary proceeding.

Mr. KINDNESS. If the gentleman would yield further, I would certainly suggest that if we can find a good, airtight way to do that, I think that is the more practical answer.

Mr. DANIELSON. I thank both of you gentleman for your questions and comments. I think we are touching upon a very important point which up to now has just fallen between the cracks in our discussions and we really have not gotten into it too far.

Following up on Mr. Hughes comment about considering making the record in a civil action not admissible in an administrative proceeding, I think probably the reverse should also be considered, not making the proceedings in the disciplinary action admissible in the civil action.

I am thinking of the analogy in ordinary civil tort litigations, the automobile accident, for example. Oftentimes in an automobile accident there is a criminal charge that arises as well as, of course, the civil action.

You can have a charge of an improper traffic maneuver, an improper lefthand turn, speeding or whatever. If a criminal action is tried first and it is resolved against the defendant, the civil action for damages is very nearly moot. It is just a question of how much, not whether.

I know that I used a simple illustration there, but I do know that it has often been the policy of the Federal Government not to try a criminal case when it is obvious that it is set up to become the foundation for a subsequent civil action.

I think we should consider very carefully whether to permit the record in either the disciplinary action or the civil action to be admissible in the other. That ties into both of you gentlemen's comments that you would like to have the disciplinary action, if any, take place very promptly. One of you gentlemen suggested 60 days.

Mr. MCNERNEY. I did, after the complaint was filed, yes, sir.

Mr. DANIELSON. I was going to raise the point that if a disciplinary action took place within 60 days after the complaint is lodged, quite obviously in most instances that would be disposed of long before the civil lawsuit could be tried.

If it were possible, then, to utilize the record in the disciplinary proceeding, to consider it in the civil action, you could create all kinds of trouble with the proper disposition of the civil action.

So I think we are going to have to ponder this more. I am going to request our very learned counsel on this side to do a little thinking and considering, and if need be, a little research along that line to help advise us.

I hope that you gentlemen will send your own legal counsel, the illustrious Alan Coffey, after similar information to help advise us. It is an important point.

We really ought to know what we are doing and right now I don't feel prepared to make a judgment one way or another.

Mr. HUGHES. Mr. Chairman, I would think that if we find that it might be prudent to not receive in evidence a record in either proceeding, that there perhaps ought to be some well-defined exceptions, that could work either to the benefit of the defendant or plaintiff. For instance, where the testimony is otherwise unavailable because of the death of a witness. In those circumstances there are precedents for such an exception.

It seems to me we could clearly define those areas where it would be necessary to permit the record where testimony is otherwise unavailable.

Mr. DANIELSON. I thank you. These are very good points. I don't know where we will go on them, but I am glad your testimony has brought them to the surface. We are going to consider them, I can assure you.

On the right to counsel, in a disciplinary proceeding to what extent would the counsel participate? Would he simply be present in order to be sure that the employee's rights are observed and that he is not imposed upon, or would he enter into the proceedings in examining witnesses, et cetera? What do you have in mind?

Mr. MCNERNEY. Well, I think this is going to be an adversary proceeding, Congressman.

Mr. DANIELSON. I am talking about the disciplinary.

Mr. MCNERNEY. I am talking about the disciplinary proceeding where the tort victim will participate or his counsel will participate in the cross-examination. I think the rights of the employee should be protected and his attorney should have the right of cross-examination as well.

Mr. DANIELSON. What you are saying perhaps is this: That he should have the right to participate to the same degree as the attorney for the complaining witness?

Mr. MCNERNEY. Exactly, sir. That is right.

Mr. DANIELSON. Mr. Harrington, do you have a comment?

Mr. HARRINGTON. Yes; I served in the Philadelphia department and we had a police advisory board and the policemen being represented by counsel was very effective because the person making the complaint was represented by counsel.

There was also one other thing. The man never got notified of the results of the hearing. This bill does the same thing. It breaks

down police work, because as a supervisor in that department, it was hard to get the man who just went through a hearing to do anything because for 5 or 6 or 7 months he never knew what the results of the last hearing was.

So I believe a man should find out the results of his own hearing.

I feel, also, that it would be senseless to have two disciplinary hearings on the same charge. It is more or less double jeopardy; if you don't catch me the first time, you might catch me the second time.

Mr. DANIELSON. At least it seems to be unfair.

Mr. HARRINGTON. I think it is unfair to have two hearings.

Mr. MAZZOLI. You talk about a double dose of administrative remedy. Where does that occur in the bill here?

Mr. HARRINGTON. As Mr. McNerney in his testimony said, it makes no sense to have two disciplinary hearings by two different agencies in two different points in time with the ultimate possibility of a judicial review.

Mr. MAZZOLI. I wonder if you can tell me where the bill provides for double?

Mr. MCNERNEY. The man's agency would hold the discipline hearing. If the tort plaintiff doesn't like the results, he can take it to the Civil Service Commission, and if he doesn't like that, he can get a judicial reveiw.

Mr. HARRINGTON. This is where it would be a financial burden on the officer accused, because he would have to hire his own defense for three different appearances where it would break morale, No. 1, because everybody would go down and look at the Washington Monument or some other thing rather than do the work they are supposed to be doing because they don't want to get in trouble and pay lawyers the rest of their lives.

Mr. MAZZOLI. Your suggestion would be that you have just one shot administratively and then you have to go to the court if you are unsatisfied with the first holding. If you feel as an aggrieved person you were not satisfied, your next step would have to be in the court; is that right?

Mr. MCNERNEY. I would think that as it stands today, under anything except tort claims any disciplinary review is handled by the man's agency that hired him, the man's supervisors, the agency head who has administered discipline over him for a period of years.

Now, all of a sudden, because of a Tort Claims Act, he is no longer in a position where he has the knowledge and wherewithal to effect discipline within his own organization. So now we have to go to the Civil Service Commission.

I think the Congress just passed a bill where they have given the Senior Executive Service and the heads of agencies—and they have made it a mandate to them—that they have to carry out the efficiency of their own department. If they don't, then they are supposed to get their walking papers.

I think this thing is in contradiction to that.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you.

I think one other point on notice of termination—I may have touched on it but I shall anyway—all things should come to an end,

I don't care what they are. It may take a while sometimes, but there should be a time when everyone can say with full confidence that this is a closed case and people can pick up their lives and move on from there. Disputes should not go on forever, which is the whole theory of the statute of limitations, and I think that is wholesome.

So I look fairly kindly upon the idea of notice of termination. I am not going to say when it should happen, but there should be a time when you know that the case is closed.

We have touched on color of office. We have touched on now the right to counsel. I also did not know that in the FBI, of which I am an alumnus, a military veteran, an armed services veteran, has the right of an appeal, but the nonveteran, nonarmed-services veteran, does not have the right of appeal.

Mr. McNERNEY. That is right, sir.

Mr. DANIELSON. That seems to do a little violence to our traditional concept of evenhandedness. It seems to me like what is sauce for the veteran ought to be sauce for the nonveteran.

Mr. KINDNESS. I think that arose because of the rights of veterans under the veterans laws as an exception to the established order. When the FBI was established in its present form back in the thirties, Mr. Hoover asked, as I understand, for a situation in which in effect every agent served at his pleasure.

In effect you give your written resignation when you are hired. It is something like what is going on over at the White House today. That is how that situation arose that the protection was given to veterans following World War II.

Mr. DANIELSON. I suppose that is how it arose. I was not aware of it.

Mr. Hughes?

Mr. HUGHES. Getting back to the question raised by my colleague from Kentucky, and I am not really sure that we are talking about the same proceeding, but Mr. McNerney suggested that he was concerned about a double hearing, two shots.

I suspect that you are talking about the provisions of the bill on page 15 which provides that within 60 days after notification of termination of an agency under section b, or if no final agency action has been taken within 1 year after the inquiry was requested, the person who requested the inquiry may seek an administrative review of the matter.

That is not a separate hearing as such? It is a review?

Mr. McNERNEY. Yes, it is a review, but——

Mr. HUGHES. It would be the same review if he went directly to the courts.

Mr. McNERNEY. We don't feel we should have the second review and we don't feel as though they should be able to go to court.

We feel you have an opportunity to present your evidence and make the case at the agency level. If you don't do it there, why should you have the opportunity, then, to go to the Civil Service Commission, where you may get some more favorable treatment, and if you don't get it there, then go to the courts and get it again? That is three strikes and you are out.

Mr. HUGHES. Do you think the defendant should have the right to have it reviewed?

Mr. McNERNEY. Yes, absolutely, if the plaintiff is going to have it.

Mr. HUGHES. But you don't think the plaintiff should have the right to review?

Mr. McNERNEY. No; I don't think so.

Mr. HUGHES. Judicial or otherwise?

Mr. McNERNEY. No, sir. He doesn't have it now. I don't see why he should have it under tort claims.

Mr. MAZZOLI. If my colleague and friend from New Jersey would yield, I think the difference is, of course, as has been presented in the testimony before this committee, that there is some concern about how objective would be an FBI Board to examine a FBI agent's activities or a Treasury Board to examine Treasury.

That is why we provided within the drafting of the bill for a review by a party or a group away from the agency itself which would then have, allegedly, at least, and arguably, a little more objectivity about what the agent did and whether or not that activity was in or out of the color of law, et cetera.

I have not made my mind up about this whole thing, but that is the way I see the rational of it. It is the same as I feel that sometimes activities of Members of Congress cannot be suitably dealt with within the confines of the Capitol Hill

I sometimes think it needs an outside person or an outside group to look because there does tend to be, and I think it is certainly an understandable attitude, of these are our friends and these are our people and we have gone through the same things they have gone through and the tendency would be a little more sympathetic perhaps to the problems than it would be if some group of outsiders were to examine our conduct.

In any event, I was making the point. That is probably why it is in the bill.

Mr. McNERNEY. Congressman, I will stand on my statement that I have never met an agency head yet who would not take disciplinary action against an employee who embarrassed that agency.

I have seen some pretty severe disciplinary action in my 40 years.

Mr. DANIELSON. I will respond along the same line.

If I remember correctly, when Director Webster was before us in the 95th Congress he was new to the job then, but I believe that this subject came up and I believe that he testified in substance and effect that he thought that they should retain the hearing and the discipline in the Bureau rather than give it to someone else because he was convinced that the Bureau would impose a much more rigorous discipline than some outside agency would, and he felt that this helped him establish and maintain control of the organization.

I never served under Director Webster, but if he follows any of the well-established precedents of the FBI, I am sure that that is true. There is no question in my mind about that.

I want to move on to a different subject. You have each mentioned delay in the hearings. We have about covered what I had in mind on that point. But I think that we should, in markup, seriously consider having prompt hearings, but unless something can be

done to insure that an early administrative hearing will not color a later civil action or vice versa, we should be careful.

If you had a 60-day administrative hearing and sufficient discipline were imposed so that it became public knowledge that the man was considered culpable, the standing of the Government in the lawsuit would be pretty well shot down before it ever got started.

This is a hazard that we are going to have to look into. I don't really know what we ought to do, but we cannot afford to overlook it. We have covered almost everything.

Mr. McNerney, on page 6, I just want to amplify one thing and this is not a criticism. The point I am going to make stems directly from the fact that you are a person affiliated with law enforcement. You state here that the purposes of the amendment to the Tort Claims Act is to remove the threat of an employee being held liable for large judgments. That is one purpose. There are other purposes.

Mr. McNERNEY. I fully understand that, sir.

Mr. DANIELSON. I am not criticizing that, sir, because you are speaking from your own points of view which we all do, very well. But other purposes were to give the injured citizen a more meaningful remedy.

We all know if you sue a Government employee and you get a big judgment, your chances of collecting it are not worth a whistle in the wind.

Also, it would provide for more efficient handling of the cases, in a sense in a case where the Government realizes it is cheaper to settle and settle now, you get rid of it without having to go through a complete lawsuit at everybody's great expense.

We would all benefit from some kind of a solution like that.

I think I have covered all the questions that I have stacked up. So I want to state, if any of the members of the committee, Mr. Kindness, Mr. Mazzoli, or Mr. Hughes, have other questions or comments, they are invited.

Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. McNerney, I would like to go back to the timing of or the limitation on the timing of the administrative hearing, the disciplinary hearing.

I am having difficulty thinking of a better measurement, but if it were to be, as you suggested, within 60 days after the filing of the complaint in a civil action, that could be 2 years plus 60 days after the alleged conduct. That, of course, is longer a delay than we think of at first blush.

What if it were to be limited in terms of time after the alleged conduct? Presumably, it would have to be a good bit more than 60 days. Perhaps the participation of the complaining witness in the disciplinary proceeding could be limited by sort of a statute of limitations running from the time the conduct occurred—180 days, 1 year, or what have you.

Would you care to comment in that area?

Mr. McNERNEY. My reasoning on this, Congressman Kindness, was that during the period of time when no complaint has been filed, and let's say it goes for 2 years before the tort victim files a

complaint, there has been no complaint made to the man's agency so he is not really under the gun at this particular point in time.

But the minute that an action would be filed in Federal court, the U.S. attorney or the Department of Justice would notify the agency head, and then if we waited until the end of the tort suit, it might be 2 or 3 years.

During that particular period of time, this man's career is in a vacuum. He is not going to be promoted. He is not going to get any desirable posts of duty. He will be in a state of limbo. We would like to overcome this.

Mr. KINDNESS. What if the participation of the complaining witness was limited by the time from the alleged conduct to the time, when he actually gave notice of his complaint to the employee's agency? That is, he doesn't wait to file a lawsuit but has to give notice within some period of time, some reasonable period of time, to the agency involved that some alleged unconstitutional conduct occurred?

This would then serve as a qualifying factor for that person to have the right to intervene in the disciplinary proceedings, if that is going to happen at all.

Mr. MCNERNEY. If I understand you correctly, Congressman, what you are saying is that the tort victim without filing suit may notify the man's agency that he is going to file a complaint against him.

No, I don't think we would go along with that one because now I think we are giving the tort victim too much authority in this matter. He is holding the iron fist over the individual. Perhaps making a limitation on the amount of time from the actual happening of the event to the time that he files a suit, that might be one way of doing it, rather than going for two years.

Mr. KINDNESS. In many cases there would not be any actual damage other than to the reputation of the individual. But it is fairly typical in this sort of case, I guess.

In those situations it seems to me maybe it is not a very real complaint if the person doesn't discern it within a relatively short time. Maybe we ought to be talking about 1 year in such cases or something of that nature. You have given us a lot of food for thought.

Mr. MCNERNEY. I feel that some of the provisions of this bill are going to open up the door to a lot of frivolous suits. My feeling is that the agent has to be protected against these frivolous suits. That is what I am concerned about. I want to protect my people from being made the goat just because some individual feels that this is a great idea to harass Federal agents.

Mr. KINDNESS. Well, at the same time I think we must be concerned with protecting the United States against frivolous actions, too.

Mr. MCNERNEY. Right.

Mr. HUGHES. Would the gentleman yield?

Mr. KINDNESS. Certainly.

Mr. HUGHES. I am not so sure that the legislation doesn't address the problem. If indeed the action of the police officer is flagrant, the agency has a right to bring a disciplinary proceeding regardless of what the victim of the tort decides to do.

By the same token, the bill provides that once a request for a disciplinary proceeding is made by the victim, that the hearing shall be conducted without unnecessary delay.

Now perhaps it might be worth considering a 60-day outside limit. That is worth considering. But I think that the intent is not to have unnecessary delay for a whole host of reasons, not the least of which is that during this period when an officer is in hiatus, his effectiveness is undermined, his morale is often very much in doubt.

Mr. McNERNEY. Not only his but his whole office.

Mr. HUGHES. That is right. The supervisor is often hesitant to assign him to high-risk duties when he is under that cloud for fear that perhaps circumstances will develop that will again put him in the public eye.

So for a whole host of reasons he is very much in doubt. You mentioned promotions, that is just one aspect of it. His credibility as a police officer, his effectiveness as an officer is very much in doubt.

So it is in our interest to try to bring that to an early resolution, whether or not the victim brings the request for the inquiry or the agency head directs it.

I think that the suggestion that we put an outside time limit on it is something we might want to consider. Certainly it is in everybody's interest, I think, to get that disciplinary proceeding resolved.

I have seen that much of the difficulty that we have, particularly in law enforcement, as to what you do with an agent that has perhaps transgressed, gone beyond the bounds of propriety.

Do you suspend him, keep him on and assign him to an administrative job? It presents a whole host of problems and becomes a big media event and that in itself begins to erode the morale of the entire department. I have seen it happen.

Mr. McNERNEY. That is right. It goes to the coverage of the whole office where the agent works.

Mr. HUGHES. Then you have police officers taking sides often and it just splits an agency quite often, with people taking sides. It does become a tremendous morale problem.

So I think we understand your concern. It may be that we ought to be thinking in terms of some specific outside limit in bringing a disciplinary proceeding where requested, or where the agency head feels that it is warranted there perhaps ought to be an outside limit.

Mr. KINDNESS. If the gentleman would yield back for a moment.

Mr. HUGHES. I thank the gentleman.

Mr. KINDNESS. The thing that occurs to me is that we may be making a mistake in trying to hinge the participation of the complaining witness, in the disciplinary proceedings, on his or her success in the civil action because that necessarily is going to be way down the line in point of time. This discussion sort of brings that into focus.

The intent is to say, OK, only those who are successful in civil actions, who really have a complaint that has been proven in court, can participate in the disciplinary proceedings. That is just not workable, apparently.

What we maybe have to start thinking about is some other measurement of how a person who is the complainant legitimately qualifies to participate in those disciplinary proceedings. By making a prompt complaint to the agency involved, or whatever the case may be.

Mr. DANIELSON. This has been a very useful discussion. I hate to cut it off, but we do have another one of the panel who has a statement, and I am going to get back to you later because I want to hear from Mr. Butterfield who has a statement that is before each of you.

Without objection, first of all, the statement will be received in the record in its entirety.

And now, Mr. Butterfield, you are free to proceed.

Mr. Butterfield is with the Association of Federal Investigators.

Mr. BUTTERFIELD. Thank you, sir.

[The prepared statement of Mr. Butterfield follows:]

STATEMENT OF SIDNEY BUTTERFIELD, EXECUTIVE DIRECTOR, ASSOCIATION OF FEDERAL INVESTIGATORS

For the past twenty two years the Association of Federal Investigators (AFI) has represented investigators from all segments of the U.S. Government. As such AFI is vitally interested in any and all legislation affecting its members. We have requested an opportunity to present our membership position relating to the amendments to the Tort Claims bill, H.R. 2659.

When the original amendments were proposed, AFI membership reviewed their contents and publicly endorsed the bill because we believed federal investigators would benefit from the relief of "personal liability" by the introduction of the Government as the defendant in matters of "good faith defense" to have the employer, the Government, as the party to any civil suit rather than the employee, the investigator.

However, between the introduction of the original bill and the current proposal, H.R. 2659, there have been significant revisions which AFI now views with serious alarm. Our committee has reviewed H.R. 2659 and consulted with other experts in the field and we find there are two specific areas which impact on our membership both as Government investigators and as taxpayers. These areas are (1) the inability of the Government to raise the "good faith defense" issue and (2) the disciplinary proceedings by various Government agencies.

We recognize the benefit of the provision wherein the Government is the defendant and bears the subsequent expense of defense, but we believe the cost for such defense could climb enormously in such an unlimited defense mechanism.

It is our opinion that H.R. 2659 as written would lead to combine two conditions (1) the Government, with its limitless pocketbook, as a defendant, and (2) the Government's inability to assert the defense of "reasonable good faith" in defending the conduct of its agents, and would substantially increase the number of suits.

It is also our opinion that to encourage any increase of civil suits would be an expense to us as taxpayers and even more importantly, it would have the side effect of seriously hurting the working investigator. Increased suits, regardless of the "Ultimate Disposition" would reflect unfavorably on performance and credibility of the investigator and even more adversely, matters of promotion and advancement. Most importantly to you this would have the chilling effect of causing the investigator to "play it safe" for the safety of his career rather than being an effective investigator.

Furthermore, as you know, in matters being resolved in today's climate, the Government frequently chooses to compromise a settlement as an economy to litigation. Such settlements do not "clear the air" but are too often considered as "prima facie" evidence of guilt. Such prima facie evidence of guilt in an administrative proceeding we believe would be unfair to the working investigator.

Disciplinary proceedings, like the litigation, could become cost intensive. Under the disciplinary proceeding provisions, an aggrieved party could cause an administrative investigation to be undertaken by the employing agency and may be invited to participate. Since the aggrieved party has already received or been awarded monetary damages, and it could now request the Government to incur additional expenses to conduct an administrative investigation. We would submit that the aggrieved party should not have "two bites of the apple."

The Association heartily joins with the Committee and the Congress in their interest to protect the public from unwarranted violation of civil matters. But the proposed amendment as set out in H.R. 2659, we believe, goes too far in requiring our members to give up more than they gain. Even though our members would benefit from no longer bearing personal liability for monetary damages, the (1) sacrifice of the good faith defense and (2) the possible substantial increase in potential suits would serve as a risk in possible loss of job or reduction in income and annuities.

Therefore, AFI is opposed to H.R. 2659 in its present form.

Thank you.

Mr. BUTTERFIELD. I am the executive director, and I might add that the statement that was passed out is the statement of Paul Adams, our national president. Unfortunately, he could not be here today.

Other than what is in the statement, I might mention that I served 23 years in four different agencies of the Government. I would have to join with the other members of the panel and say that to my knowledge I have never seen an agency fail to take administrative action against the conduct of an employee in the four agencies that I worked for.

Mr. DANIELSON. Would you state what they are, just for the record?

Mr. BUTTERFIELD. The Federal Bureau of Investigation, Agency for International Development, the Department of Health, Education, and Welfare, and finally, the Nuclear Regulatory Commission, all of them as an investigator.

I think the tendency is to come down pretty hard on an investigator that oversteps the bounds because of the difficulties it creates for everybody.

I have nothing that I can add anything to. Our statement is pretty much the same as what the other gentlemen have said. I would be glad to try to answer any questions that you might have.

Mr. DANIELSON. Thank you, Mr. Butterfield.

The reason I allowed the discussion to continue before recognizing you was that I realized that your statement was in line with those previously presented and I think that our discussion and debate here were very wholesome because we touched upon a lot of points that we had not heretofore touched upon.

Does Mr. Kindness or Mr. Mazzoli have a question of Mr. Butterfield?

Mr. KINDNESS. Thank you, no, Mr. Chairman. I have no questions.

Mr. DANIELSON. Summarizing it, you are in accord with the previous statements and your attitude would be similar to that voiced by the others here.

Do you have any points in which you differ from what has been said here?

Mr. BUTTERFIELD. No, sir, I have no difference whatsoever. The only thing I might mention is that our organization does cover across-the-board Federal investigators, regardless of what type of work they happen to be in, such as criminal, personnel, or anything like that.

Mr. DANIELSON. Is that present as well as former investigators?

Mr. BUTTERFIELD. Yes, sir, it is.

Mr. DANIELSON. Then I would gather that you and Mr. McNerney have some of the same members within your respective organization?

Mr. MCNERNEY. That is right, sir. As a matter of fact, I belong to their organization, also.

Mr. DANIELSON. And I think you are all associated with Mr. Burden's organization. I forget the name of it.

Mr. BURDEN. National Law Enforcement Council.

Mr. DANIELSON. I want to touch on two fairly brief things. Apropos of discipline, there are many levels of administrative or executive branch discipline today. As I see it, they can reach from the minimum level of calling the man in and saying, shame on you—in other words, a reprimand and what may be a letter in his personnel file to show that "Joe Agent" overstepped the bounds a little bit and he has been reminded of that by the agent in charge.

That is about as minimal as you will get. From there up to discharge, which is about, I suppose you still can fire with prejudice so that they cannot be reemployed, I don't know. But discharge is the ultimate.

Now, in a disciplinary proceeding contemplated by this bill, I just wonder if there would be any need for the employee to have counsel when he is called into the office of the agent in charge and called on the carpet and told, quit doing that, or don't do it again, or shame on you, or whatever it may be.

I just don't think it is necessary at that point and I would just like to know if you agree or disagree with me?

Mr. MCNERNEY. I don't know, Congressman. That would depend. That would depend as far as we are concerned on if the tort victim is going to be present, if he is going to be able to present evidence.

Mr. DANIELSON. No; you are changing my facts. I just say when he is called into the boss' office and told, look, I know you were speeding, you had your lights off. And you scared the pants off that traffic officer. And the chief has called me and said, can't you make that guy follow the traffic rules, and you say, I will see that he does.

You don't need counsel in a case like that.

Mr. MCNERNEY. I would agree with that.

Mr. DANIELSON. I think what we are contemplating is a little more serious type of discipline, where a more formal disciplinary procedure is evoked; is that it?

Mr. MCNERNEY. That is right.

Mr. DANIELSON. I remember when we tried courts-martial for the Navy. We had three levels, captain's mast.

Mr. MCNERNEY. That is like company punishment in the Army.

Mr. DANIELSON. It could be.

Anyway, you go up before the captain and he tells you to behave yourself and you lose two weekends of liberty, or you forfeited an evening of liberty. That would not make a lot of difference, but it was discipline.

Then you had a special court-martial which was an informal, not extremely formal but nevertheless a formal hearing.

Then, of course, you had the general court-martial.

I think what we are talking about is that formal type of hearing and not the very routine discipline.

Does anyone disagree on that point?

Mr. McNERNEY. No. That is what I was referring to in our testimony.

Mr. DANIELSON. We don't have that worked out, but I think we have to do something with it as we handle this bill.

That is really all I have. Do any of you gentlemen have something you would like to say?

I see two hands coming up. Let's start in the middle with Mr. Murphy.

Mr. MURPHY. Yes. I am Glen Murphy, legal counsel to the International Association of Chiefs of Police.

We are a little different kind of organization. We represent 13,000 police executives in the United States.

Mr. DANIELSON. Yours are principally local and country police types?

Mr. MURPHY. No. Federal agencies also belong, and international agencies, too. But the bulk of it is in the United States.

I would like to make a couple of points, if I may.

First, we have just concluded a 2½-year study of police discipline in the United States which has to do with State, municipal, and local agencies, so we feel we have some knowledge of what is going on in the disciplinary field in the United States, of which I happen to be project director.

Second, I think that, Mr. Chairman, that I would like to bring your attention to the fact that there has been a study that was done in 1968, I think, on the kinds of misconduct and lawsuits that have been brought against law enforcement agencies.

An update of that is about to be printed. I think that is going to be a very significant study that this committee ought to take a look at when it is finished.

Mr. DANIELSON. When will it be printed?

Mr. MURPHY. October, probably.

Mr. DANIELSON. Well, if you can, when it is printed, would you send one to the committee and we can at least lodge it in the file and it will make a good reference.

Mr. MURPHY. Certainly.

I think, first, it is showing that the number of lawsuits, and I might add that the number of spurious lawsuits against officers is going up at a tremendous rate.

As you know, or may not know, at the municipal level it is impossible to buy liability insurance for an individual officer from a domestic carrier at this time. I am personally dealing with some to see if we can't get insurance. That is partly because of the problems that dwell in the whole area which brings me to one of the reasons that I wanted to comment here.

I think that what you do here has a tremendous impact on State and local law enforcement. As you know, the Federal law has a trickle-down effect into what happens in local law enforcement. I think that the provisions here on removing the reasonable good faith provisions is a very dangerous thing as it relates to a local law enforcement officer.

I think the dangerous thing, that doing it to the Federal law enforcement officer without adding a proviso that any kind of subsequent lawsuits or administrative hearings, he has not lost

good faith defense as an individual. I don't think that would offend what you are trying to do as the Federal Government stepping in as the plaintiff.

You were talking about, and Mr. Hughes and Mr. Kindness were both speaking about, can you limit the ability of counsel to use the evidence in either the administrative hearing or the civil hearing? That happens to be what the law is in most of the 50 States, that you may not use the evidence from one of the proceedings in the other proceeding.

In our many Federal lawsuits, there are cases that hold that which we will put in our statement to you. As a matter of fact, we will submit as part of our record to both counsel a copy of the text that we have just completed on discipline. I think that that is a very significant thing, that that be a limitation on what can or cannot be done as far as evidence in one hearing or another.

I would also like to point out that one of the reasons that I am also concerned about right to counsel—by the way, if you are a State or local police officer, the Supreme Court has said that it is administrative due process that at the time of an administrative hearing you must give them the right to counsel.

I think that there are some provisions or some agencies perhaps at the Federal level in the intelligence area where that may not be appropriate. I would agree with that.

But it seems to me that one standard at the State and local level and one at the Federal level is not evenhandedness.

Those were some of the comments that I wanted to make. Certainly we will submit more information for the committee.

Mr. DANIELSON. Thank you, Mr. Murphy.

Any questions or observation?

Mr. Harrington?

Mr. HARRINGTON. Thank you.

I wanted to bring to the committee's attention many of the points that Mr. Murphy spoke of, but in addition to those, I will not repeat the ones that I was thinking of, but in addition to those, there is going to be two kinds of cases that you are going to be faced with.

You are going to be faced with cases that will be the result of a man's personal decision. You are going to be faced with cases that will be the result of him carrying out a direct order from his superiors.

Then you are going to have the person who will feel that their rights were violated, and this has been charged in police brutality cases, where the policeman did not smile when he was giving them a ticket or did not smile when he was placing them under arrest. But these would all result in cases. So we are going to have two kinds of things to deal with.

Also, as we were speaking about this double jeopardy, and as Congressman Mazzoli pointed out, that maybe a person would feel that they are getting the better deal if other than the heads of the department heard the case.

You must remember that the police work that you are talking about is a profession and it could better be solved, whether the man did it in the proper manner or in an improper manner, by people who know what the profession is all about because the best

person to judge whether a doctor did the right or wrong thing would be a panel of doctors, the same with attorneys, et cetera. The profession should be tried by professional people.

As Mr. Murphy was talking, the thought came to my mind. It would be best for the man to be represented by counsel at these hearings of discipline because there may be something said at these hearings of discipline which may come first that could guide the counsel of those who are going to eventually sue the Government, and it could give them material that they could use to win their case against the Government.

So I think a man should have counsel who would protect him and protect the Government from the very start.

Mr. DANIELSON. This brings up a point, of course, which I think we are all aware of and that is that there is no such thing as a perfect law. We can't conceivably cover all contingencies. I hope that we do as well as is possible and to come as close to nirvana as you can in making a public law.

I thank each and every one of you for your participation. All along we hoped to have one day where the representatives of law enforcement could come in and tell their side of the story. I think you have done it and done it well.

We appreciate very much your help. I don't know what we are going to come out with, but I can assure you it will be the result of a best effort.

We will have one more hearing to take testimony on this bill. I cannot set the date due to the crush of committee and floor work that has piled up, but we will have testimony from the Merit Systems Protection Board, from the American Bar Association, and from a professor from Columbia University. This will take place at our next meeting and you will just have to watch the papers, et cetera, and the notice for that.

I had hoped to do it tomorrow, but a matter has come up in the full Judiciary Committee which will render that impossible. So we will have it very shortly and then we propose to move into markup and turn out a masterpiece of legislation.

Thank you all very much. The subcommittee stands adjourned.

[Whereupon, at 11:59 a.m. the subcommittee adjourned.]

AMENDMENT OF THE FEDERAL TORT CLAIMS ACT

WEDNESDAY, AUGUST 1, 1979

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Harris, McClory, and Kindness.

Staff present: William P. Shattuck, counsel; James H. Lauer, Jr., assistant counsel; Alan F. Coffey, Jr., associate counsel; and Florence McGrady, clerk.

Mr. DANIELSON. The subcommittee will come to order.

This morning, we will continue with taking testimony on the bill, H.R. 2659, amendments to the Federal Tort Claims Act, and our first witness this morning is Prof. George Bermann, professor of law, Columbia University School of Law.

Professor Bermann, welcome. Come forward and make yourself comfortable. We have your statement, which without objection, will be received in the record in its entirety. You may read it if you wish. I assure you that we all can read and some of us probably already have read the statement, so you are free to present your case in the most persuasive manner possible, anyway you like.

TESTIMONY OF GEORGE A. BERMANN, PROFESSOR OF LAW, COLUMBIA UNIVERSITY SCHOOL OF LAW

Mr. BERMANN. Thank you.

I will be succinct, largely because I have submitted a statement and because I have written on this subject at much greater length than anyone would care to hear today. So I would like to simply summarize my views on H.R. 2659, which are extremely favorable, emphatically favorable.

I am quite enthusiastic about the notion of making the Federal Government exclusively liable for the torts of the injuries arising out of the torts committed by its officers and employees, and I don't suppose this aspect of the reform needs special attention now.

My problems with H.R. 2659 rather to some more or less narrow details about the bill that bother me. None of these observations in any way undermines or is designed to even criticize the basic thrust of the legislation, which is the making of the Government exclusively liable, to relieve individuals of the fears of litigation

and possible liability, thereby simplifying tort litigation on the Federal level, which is a very useful purpose, I would think.

The problems I have with H.R. 2689 arise from two sources. The first and perhaps the larger of my two areas of objections is the effort that has been made by H.R. 2659 to bring the so-called constitutional torts into the framework of the Federal Tort Claims Act, which is rather silent about the existence of such torts as presently drafted.

I feel in a sense that H.R. 2659 has focused on constitutional torts to such an extent that I believe it has improperly left out of view the continuing importance of nonconstitutional torts by which, I understand, torts cannot conveniently be fitted under one or another constitutional provisions as having been violated.

Obviously negligence comes most often to mind. I would suppose that acts of negligence on the part of Government officials are at least as frequent as constitutional violations and can cause just as much injury as so-called constitutional torts, and yet many of the most attractive features of this legislation appear to me, to my reading, to be limited to the phenomenon of constitutional torts.

I have in mind, for example, the broadening of the term "scope of employment" to "scope of employment or color of office," in the case of constitutional torts, but not in the case of common law torts.

I have in mind certain of the remedial advantages extended to constitutional tort plaintiffs, such as liquidated damage provisions and waiver of immunity provisions, class action provisions and so on.

I offhand see no good reason for making a distinction in these respects between constitutional and nonconstitutional torts, especially as I would expect the incidence of common law torts to continue just as they have in the past, notwithstanding the recognition by the courts and by Congress of constitutional torts over the last 10 or 12 years.

The second reason for my objection is to the importance that this distinction appears to have in H.R. 2659 is one that has been alluded to, I am certain, by some of your prior witnesses, and that is the other unworkability of the distinction between constitutional and nonconstitutional torts, the distinction that is going to be very difficult to make operational, and yet a distinction, as I read 2659, on which some very important substantive and procedural distinctions are going to hang if this bill is enacted.

My second range of objections has to do with the disciplinary mechanism, which I, too, am delighted to see included in this draft of the bill.

When I first confronted the subject matter, which was before I became aware of the pending piece of legislation—I had become interested in doing academic research of my own—I observed rather immediately that making the Government the exclusive defendant in tort litigation arising out of the activity of Federal employees, while that would have enormous advantages, that a sine qua non of such a move should be the continuing accountability of Federal officials, personal accountability in some other form, and I was not terribly enthusiastic about the disciplinary amend-

ments as I first read them in the early draft of this piece of legislation.

I think great improvements have been made in H.R. 2659 and I would like only very briefly in conclusion to point out the details in which I feel the disciplinary amendments fall short.

First, again, I fail to see why so sharp a distinction should be made between constitutional and nonconstitutional torts with respect to the triggering of the inquiry process, which is the centerpiece of the disciplinary amendments, as I understand them. I see no good policy reason and I see lots of practical reasons for not building such a distinction into the Federal Torts Claims Act.

As I mentioned in my statement, I was a little troubled by the relationship between the administrative investigation that is referred to in section 2681(f) of the proposed legislation, "administrative investigation or disciplinary action", which is automatic upon an award of monetary relief to a tort plaintiff, on the one hand, and the inquiry proceedings which appear to be more greatly the focus of attention in the bill.

From having seen prior drafts of the bill I suspect that the inquiry referred to in section 2683 was a later addition to the piece of legislation and built upon section 2691 which, as I recall, appeared in the earliest drafts of this form of legislation. I think that relationship between the two should be clarified if possible.

More specifically, the investigation referred to in section 2681 is automatic, it does not require a request, you do not have to demand a request on the part of the alleged tort victim, whereas the inquiry referred to in 2693 is not automatic, it presupposes a request by the aggrieved person.

On the other hand, section 2683 does have procedural outlines set forth in this bill and the administrative investigation referred to in section 2681 does not. In other words, I see advantages to each, and in any case, I think they are rather poorly integrated, the one with the other.

A fourth procedural objection I have is the notion that willingness to litigate should play so important a role in triggering the disciplinary process. I wouldn't have thought that we would be as anxious as I think this bill would suggest to have litigation over governmental tort claims. I for one would be just as pleased to see alleged tort victims content with triggering a disciplinary process without making the alleged tort victim feel or believe that he or she has to institute litigation in order to trigger a process to take place, the trigger process that I see in this piece of legislation.

Finally, I think the bill is somewhat regrettable in its failure to indicate any guidelines whatsoever for the imposition of disciplinary sanctions, any meaningful guidelines. If possible, I think some should be suggested in the legislation.

And finally, I am a bit concerned with the approach to detailing the procedures that will apply in the disciplinary proceedings. I wonder if the subcommittee couldn't do better than to refer to the sole and unreviewable discretion of the agency head and be a little more specific about what procedures might be made available either to the alleged tort victim or the employee, the alleged tortfeasor.

However, in conclusions, I would like to stress, as I did at the outset, that the general thrust of the bill is one that I am most enthusiastic about, that conforms to my notions of what the reform should have been before I knew there was a reform ongoing. And finally, finds abroad in foreign legal systems, which I have studied, notably the French and German legal systems, a very parallel trend toward substituting the Government for the individual official as primarily the tortfeasor with respect to compensation claims.

I think other sophisticated legal systems have encountered many of the same difficulties that underlie this initiative.

Thank you.

Mr. DANIELSON. Thank you very much, Professor Bermann. I appreciate your very succinct presentation of a very complete and very well drafted statement, which is in the record.

[The prepared statement of Mr. Bermann follows:]

STATEMENT OF GEORGE A. BERMANN, PROFESSOR OF LAW, COLUMBIA UNIVERSITY SCHOOL OF LAW

I wish to thank this subcommittee for the opportunity to present my views on H.R. 2659, a bill to amend the Federal Tort Claims Act to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees and to provide a remedy against the United States for constitutional torts. The subject matter is one of special academic interest to me and deserves, I believe, the careful attention that this subcommittee has given it.

For reasons set out fully in a 1977 Columbia Law Review article on the subject,[1] I strongly endorse the view that the federal government be made the exclusive defendant in tort suits arising out of wrongful acts of its officers and employees acting within the scope of their office or employment. This reform will serve the dual purposes of assuring the full compensation of governmental tort victims and relieving governmental officers and employees of the often stifling effects of the prospect of personal litigation and liability. It would also have the salutary effect of greatly simplifying governmental tort litigation which today is frequently delayed, complicated, and made more costly by the joinder of multiple individual defendants[2] and the pervasive presence of issues of absolute or qualified immunity which often have little to do with the plaintiff's entitlement to monetary relief.[3] Eliminating the immunity problem is of more than procedural significance, for it would relieve judges and juries of the difficulty of arriving at a figure of damages that is both adequate to compensate the tort victim and at the same time neither unfair to the official involved nor destructive of employee morale.

As I understand it, H.R. 2659 would accomplished each of these purposes by amending 28 U.S.C. 2679(b) to make the tort remedy against the United States under the Federal Tort Claims Act "exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose act or omission gave rise to the claim," provided the official or employee was acting within the scope of his office or employment. Yet, as the history of this bill and related bills indicates, what would appear to be a simple reform of existing legislation runs into two persistent difficulties. First, although there has developed over the past ten years a growing concern over violations of constitutional rights, the Federal Tort Claims Act does not expressly state a cause of action for these so-called constitutional torts. Second, even if it can be made into a comprehensive and efficient mechanism for compensating all governmental tort victims, the Federal Tort Claims Act at present in no way assures the accountability of individual officials, whether from a retributive or a deterrent point of view.[4]

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[1] Bermann, "Integrating Governmental and Officer Tort Liability," 77 Colum. L. Rev. 1175.

[2] The expense and awkwardness of hiring outside attorneys to defend federal officials sued in tort is described by Attorney General Bell, "Proposed Amendments to the Federal Tort Claims Act" 7-9.

[3] For this reason, section 3 of H.R. 2659 provides that the United States may not assert as a defense to a constitutional tort claim the absolute or qualified immunity of the employee whose act or omission gives rise to the claim.

[4] The Supreme Court has to infer a governmental right of recovery against federal officials under the Federal Tort Claims Act. *United States* v. *Gilman*, 347 U.S. 507 (1945).

While H.R. 2659 plainly represents a substantial improvement over previous bills in the extent to which it addresses these problems, I continue to have reservations about it in precisely these two respects. First, I believe that in expanding the Federal Tort Claims Act to embrace constitutional torts, H.R. 2659 deepens rather than lessens our dependence on the largely unworkable distinction between constitutional and nonconstitutional torts. Second, the disciplinary amendments are deficient in a number of respects, especially as concerns participation of the governmental tort victim in the disciplinary mechanism. The comments that follow address these two aspects in turn.

UNSOUND AND UNNECESSARY DISTINCTIONS BETWEEN CONSTITUTIONAL AND NONCONSTITUTIONAL TORTS

In the course of expanding the Federal Tort Claims Act to reach tort claims arising under the Constitution, H.R. 2659 also makes a series of apparent distinctions between constitutional and nonconstitutional torts. I am not convinced that these distinctions are necessary from a policy point of view. In any case, I believe that the difficulties of applying the constitutional/nonconstitutional tort dichotomy far outweigh the advantages of treating these categories of cases differently.

In each case, the effect of the constitutional/nonconstitutional tort distinction is to extend to the constitutional tort plaintiff a benefit withheld from the nonconstitutional tort plaintiff. Thus, the bill guarantees a minimum recovery of $1000 liquidated damages to constitutional tort victims even in the absence of proof of actual damages.[5] Furthermore, such plaintiffs enjoy an automatic waiver by the government of the individual official's immunity defense,[6] entitlement to reasonable attorney's fees[7] and reasonable litigation costs,[8] and the right to bring class action litigation.[9] The liquidated damages advantage may be justified on the ground that the injury flowing from constitutional violations is typically difficult to quantify. However, I do not find the other remedial advantages as easy to explain. Perhaps it is thought that these advantages are also needed as incentives to bring constitutional tort suits, but this is far from clear. In any case, victims of nonconstitutional torts likewise may need this type of incentive.

While the most obvious distinctions in H.R. 2659 between constitutional and nonconstitutional torts are remedial in character, there are others that go to the very heart of the Federal Tort Claims Act. The first concerns the applicability of the statutory exceptions to liability contained in 28 U.S.C. 2680, the most important of which is the discretionary acts exception.[10] The second has to do with whether the employee must be acting within the scope of his employment in order for the federal government to be liable for his torts.

Section 1(b) of the bill expressly provides that the United States shall have available all defenses to conventional tort claims that it would have been entitled to if the action had originally been commenced against it. Presumably this includes the exceptions of 28 U.S.C. 2680. On the other hand, the bill expressly excludes all but one of the section 2680 exceptions, including the discretionary acts exception, in the case of constitutional tort claims.[11] This categorical distinction between constitutional and nonconstitutional torts is not justified; if the discretionary acts exception, for example, should be discarded, it should be discarded in both categories of cases.

H.R. 2659 draws a similarly needless distinction in the matter of the official's scope of authority. Specifically, it makes the government exclusively liable for constitutional torts committed by an officer or employee "while acting within the scope of his office or employment, *or under color thereof*"[12] (emphasis added), whereas in the case of conventional torts, the government as now would be liable only for negligent or wrongful acts of an officer or employee "while acting within the scope of his office or employment."[13] Significantly, if the Attorney General certifies that the defendant employee in the case of constitutional torts was acting solely under color of office, he must so notify the plaintiff and give him an opportunity within ten days to elect to proceed against the official rather than against the government. In no event may he sue both.[14] Quite apart from the difficulty of distinguishing constitutional from nonconstitutional torts, this right of election is a needless com-

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[5] Proposed section 2681(b).
[6] Id.
[7] Id.
[8] Id.
[9] Proposed section 2681(d).
[10] 28 U.S.C. 2680(a)(1970).
[11] Proposed section 2681(g).
[12] Proposed section 2681(a).
[13] H.R. 2659 section 1.
[14] Proposed section 2681(e)(2)(A).

plication of the Federal Tort Claims Act and therefore at cross-purposes with the effort of H.R. 2659 to streamline governmental tort claims litigation. As a practical matter, it is not likely that a plaintiff will elect to sue the individual official. First, notwithstanding the Attorney General's certification, a court subsequently may find that the defendant employee is entitled to some form of immunity not enjoyed by the government. In any case, the official is less likely than the government to be able to satisfy a large judgment in full. Finally, even if the plaintiff is intent on pursuing the individual official, H.R. 2659 would give him the right to instigate and participate in disciplinary proceedings. This should satisfy and legitimate interest on his part in seeing that justice is done.

It is preferable to fix the government's scope of liability in the statute, either limiting it to actions within the employee's scope of authority or extending it also to acts taken under color of office. As between these alternatives, I prefer the latter. It is more consistent with the values of full compensation and loss-spreading for injuries somehow connected with governmental action. It would more effectively relieve the official of the prospect of personal litigation and liability, which is one of the chief purposes behind H.R. 2659. Finally, it would often avoid the necessity of premature threshold determinations on the question whether the employee was acting within the scope of his authority or solely under color of office. Both in terms of its relevance and its feasibility, this determination is best left to the disciplinary phase of the affair. But whichever formulation is adopted, there is no reason to make the necessity of such determination depend, as H.R. 2659 does, upon whether the underlying claim sounds in constitutional or nonconstitutional tort. Doing so only makes the legal issues in governmental tort litigation more abstract and conceptual than they already are.

Not only am I unpersuaded that, as a policy matter, victims of constitutional torts should categorically be treated better than victims of nonconstitutional torts (such as negligence or defamation) on the points mentioned above. I am also fearful that doing so will give the largely unworkable distinction between constitutional and nonconstitutional torts even more importance than it received in last year's Supreme Court decision in *Butz* v. *Economou*,[15] holding that the scope of a federal official's immunity from liability is absolute or qualified, depending on whether he has committed a common law or a constitutional tort, respectively. As the partially dissenting opinion in that case points out, the distinction is not only illogical but also impracticable.[16] With some ingenuity, virtually any common law tort can be dressed up in the guise of a constitutional wrong. Thus, in this respect, H.R. 2659 only heightens the artificiality of current governmental tort law. I would not, absent compelling reasons, attach as much practical importance to the distinction as H.R. 2659 does. In itself, the introduction of constitutional torts into the Federal Tort Claims Act will raise difficult enough problems.[17] They should not be compounded by retaining unnecessary and troublesome distinctions among the torts brought within the Act.

The American Civil Liberties Union also has pointed out to the subcommittee the weaknesses of the constitutional/nonconstitutional tort dichotomy and suggested that H.R. 2659 be amended to assimilate intentional to constitutional torts.[18] This change is probably insufficient, for there remain common law torts such as trespass, negligence, and possibly even gross negligence, that are neither constitutional nor intentional in character. Because such torts would continue, even under the ACLU suggestion, to be treated differently from constitutional and intentional torts, nice distinctions will still have to be made. I would strongly argue against special treatment of constitutional torts, or even both constitutional and intentional torts, both for purposes of the general principle of exclusive governmental liability and for purposes of the various remedial and substantive advantages cited above.

DEFICIENCIES IN H.R. 2659'S DISCIPLINARY MECHANISM

As I have suggested elsewhere, "no system based upon exclusive governmental liability should be adopted simply because it offers an expedient way of compensat-

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[15] ——U.S.——, 57 L.Ed 2d 895 (1978).

[16] Id. at 925.

[17] To this date, the Supreme Court has recognized constitutional tort claims only for unlawful entry and search in violation of the 4th Amendment (*Bivens* v. *Six Unknown Agents of the Bureau of Narcotics*, 403 U.S. 288 (1971) and sex discrimination in violation of the equal protection clause of the 5th Amendment (*Davis* v. *Passman*, 47 L.W. 4643 (June 5, 1979). The lower federal courts are in wide disagreement as to whether and to what extent other constitutional violations give rise to a cause of action in constitutional tort. See Attorney General Bell, supra note 2, at 2.

[18] Statement of Karen Christensen, Legislative Counsel ACLU, before the House Judiciary Committee, Subcommittee on Administrative Law and Governmental Relations, June 21, 1979.

ing the victims of government-inflicted harm. Society has at least as much interest in preventing misconduct as in compensating those injured by such misconduct. Society also has a right to insist that when public officials conduct themselves egregiously, they do so at their own risk." [19] H.R. 2659 goes a long way beyond earlier bills in mandating a disciplinary procedure in the case of constitutional violations. Nonetheless, a number of important problems remain in H.R. 2659's disciplinary amendments.

First, as mentioned earlier, it is not entirely clear why the disciplinary amendments should be confined to cases of constitutional torts. Depending on the circumstances, common law torts such as assault, defamation, trespass, and even negligence, can be as deserving of deterrence and punishment as constitutional torts. I simply do not believe that society's interest in seeing that future injury is prevented or justice is done should be reduced to a distinction between constitutional and nonconstitutional torts, even if that distinction were more workable than it appears to be.

More fundamentally, I perceive no sound reason for making a tort victim's right to trigger the disciplinary mechanism of H.R. 2659 depend on his willingness or capacity to engage in litigation. It seems a mistake to me to encourage tort victims to institute litigation when they otherwise would be content to see a reliable disciplinary mechanism set in motion.

A third problem with the disciplinary amendments—and one that most likely could be cured by redrafting—is the somewhat obscure relationship between the "administrative investigation or disciplinary action" referred to in the proposed section 2681(f) of 28 U.S.C. to the simple "inquiry" referred to in proposed section 2683. According to the bill, section 2681(f) would require the Attorney General, in any constitutional tort litigation resulting in a judgment against the United States (or an award, compromise, or settlement) to forward the matter for "appropriate" action to the head of the employing agency. In itself, this provision is flawed. It is unsound to confine the reference of serious constitution tort claims to the agency concerned only when the litigation results in a judgment (or in an award, compromise, or settlement) against the United States. The litigation may fail to result in a favorable judgment on any number of procedural, technical or minor substantive grounds that do not rule out the need for agency investigation and possible disciplinary action.

The Attorney General should be directed by statute to forward the matter in any case in which such agency measures might be useful. A parallel problem is raised by the provision governing administrative review of the agency head's proposed disciplinary action.[20] Such review is not available at the instance of the tort victim unless he has already obtained a money judgment (or accepted an award, compromise or settlement). In the absence of such a condition, administrative review may not be had without leave of the agency conducting the inquiry.

To some extent, the requirement of a favorable judgment to trigger the automatic reference to the agency head under section 2681(f) is repaired by proposed section 2683(a), which not only allows persons actually obtaining a money judgment (or accepting an award, compromise or settlement) to request an "inquiry" within sixty days, but also allows any person to do so within sixty to 120 days after bringing suit on a constitutional tort claim. Thus, section 2683 would have the advantage of not making success in litigation (or its equivalent) a precondition to triggering the "inquiry" mechanism.

Ultimately, both sections 2681(f) and 2683 have their advantages. The former would make reference to the agency head automatic, which is not the case under the latter. Section 2683 makes a request by the tort victim necessary before a disciplinary inquiry is triggered. On the other hand, section 2683 has the advantage of requiring a specific type of inquiry whose procedures are spelled out elsewhere in the bill. Section 2681(f) refers only to "such further administrative investigation or disciplinary action as may be appropriate." In short, the disciplinary aspects of H.R. 2659 do not seem as well integrated as they might be, perhaps a result of successive modifications in the bill in response to calls for a more effective and reliable disciplinary mechanism.

Fourth, the disciplinary amendments of H.R. 2659 do not need to be as devoid of standards for the imposition of disciplinary sanctions as they appear to be. The problems of establishing an effective civil service system cannot be exaggerated and go well beyond the problems of governmental tort liability.[21] Nevertheless, it would

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[19] Bermann, supra note 1, at 1198–99.

[20] Proposed section 2684(e).

[21] Congress enacted a comprehensive Civil Service Reform Act in 1978 that was designed in part to upgrade the quality of the disciplinary functions of the former Civil Service Commission.

be both possible and useful for Congress to give both the inquiring and the reviewing agency some indication of the categories of cases, or at least some of the circumstances, in which some sanction should be imposed and, in such cases, how severe the sanction should be. This is not to suggest that Congress can or should enter into detail on these matters. It cannot and should not. But it can and should give some general points of reference.

A different aspect of the disciplinary amendments of H.R. 2659 on which congressional reticence is less justified is the matter of inquiry procedures. The bill leaves it to the "sole and unreviewable discretion" of the agency head to decide whether the employee or tort victim shall have such important procedural prerogatives as the opportunity to examine and cross-examine witnesses or to suggest witnesses to be called and documents to be produced.[22] The one curiously one-sided procedural detail the bill does not establish is that the agency head may give the employee alone or both the employee and the tort victim the prerogatives just mentioned, but categorically may not give them only to the victim. I suspect that an agency head is most unlikely to deny a federal employee the right to examine witnesses and demand documents in a proceeding in which he is threatened with disciplinary sanctions, and at the same time grant those rights to the victim who has nothing concrete to gain or lose as a result of the proceeding. For this reason, the proviso seems out of place in light of the procedural carte blanche the agency head otherwise enjoys.

I believe the subcommittee should give some consideration to amplifying the procedural provisions governing the agency inquiry. This seems especially useful in light of the fact that, under the bill, both the reviewing agency [23] and the reviewing court [24] exercise deferential standards of substantive review of the disciplinary decisions before them.

CONCLUSION

While extremely supportive of the general reform principles of H.R. 2659 and appreciative of its progress over its precursors, I remain troubled by certain of its implementing features. I hope that my comments are of some help to the subcommittee in fashioning the reform of the Federal Tort Claims Act in such a way as to best promote its compensatory and deterrent purposes.

Mr. DANIELSON. I am going to yield first to the distinguished gentleman from Illinois, Mr. McClory, who is the ranking member of the full Judiciary Committee, and I know has some very well informed and important points of view on this bill.

Mr. MCCLORY. And I uniformly have very high praise for my distinguished subcommittee chairman.

Mr. DANIELSON. We have a rough life here. We have to butter each other up each morning in order to feel good.

Mr. MCCLORY. Thank you very much. I do have a few questions.

One question involves the question of good faith. The bill would really eliminate the right of the Federal Government, in respect to the claims which arise under the Constitution, to the so-called good faith defense. I think in eliminating the absolute immunity that we have accorded to the Government, at the same time when we do renounce the immunity principle, should we eliminate the same defense that a person, a nongovernmental entity, would have? It seems to me by eliminating the good faith defense we are going a little too far.

What do you think?

Mr. BERMANN. I think rather not. As I understand it, the good faith defense entered the law of individual officer torts, torts committed by individual officers, as a way of protecting individual officers either from unfairly burdensome judgments or from the paralysis that is thought to be generated by the spectre of such judgments in the future.

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[22] Proposed section 2684(b).
[23] Proposed section 2684(c) ("reasonable").
[24] Proposed section 2684(d) ("arbitrary or capricious or * * * unsupported by substantial evidence").

If and when we move toward a system of governmental tort liability it seems to me, upon a good deal of reflection, that the policy reasons for good faith defense do not obtain to the same degree as they do in the case in which we have an individual officer as the primary defendant.

That doesn't mean that good faith becomes irrelevant. It would seem to me the issue of good faith should be then transposed to the disciplinary phase of whatever proceedings would occur and would play a primary role, I should say, perhaps a truly preeminent role in determining whether and to what extent disciplinary sanctions are in order.

It doesn't seem to me that good faith is nearly as relevant to whether an individual tortfeasor should receive compensation for torts that have been committed to his detriment.

Mr. McCLORY. I suppose an example of this would be invasions of privacy by investigative officers and perhaps depriving a person of their constitutional right to a warrant as a prerequisite to search and seizure, and that sort of thing. You feel that while that good faith defense might be applicable to the individual when sued, the master shouldn't have the same defense as the agent?

Mr. BERMANN. If we look at the Federal Torts Claims Act, even as currently constituted, there is no indication of a good faith defense. There are a number of exceptions that we are all familiar with, some very broad exceptions, but there is no good faith defense built into the Federal Tort Claims Act as it now stands.

Mr. McCLORY. I think that is one reason why we are considering the legislation, because we are here subjecting the people, who thought they were doing their duty to their country and to their agency, to personal liability.

The Attorney General—I was with him yesterday—and he said he has 300 lawsuits pending against him.

Mr. BERMANN. I believe that.

Mr. McCLORY. Public service has become hazardous employment under such circumstances. So in a way, what we are doing with this legislation is trying to protect our Federal employees, when there is liability, and impose it on the Government.

But at the same time, I don't know that by eliminating the immunity and enactment of this statute that we want to deprive the Government of the defense that otherwise would be available to the employee or the servant.

Mr. BERMANN. As I mentioned, it simply doesn't seem to me—the good faith of the individual official does not seem to me to be relevant to the entitlement to compensation by a constitutional tort victim. Once a constitutional tort has been established, which may be no easy feat, alleged and proven, and also recognized by the Federal courts as a constitutional tort—once that is established, it would seem to me irrelevant whether that tort was committed in good faith or bad faith so far as compensation of the victim is concerned.

Insofar as retribution or deterrence is concerned, I think it retains its relevance, but in the disciplinary phase of things.

A number of States, approximately half the States that I have examined, have enacted comprehensive tort claims legislation that for better or for worse, attempt to integrate governmental and

official tort liability, and most of them have adopted one or another version of the following notions: That the Government should primarily be able, in this case the State government, but that an action, whether of a disciplinary action, whether of a disciplinary character or the fact a third party action in tort, should be available to the advantage of the Government against the individual official who had acted in bad faith.

Mr. McCLORY. I am a little wary of that proposition that you have stated, because hindsight is so marvelous in determining whether or not a constitutional right was violated. It seems to be almost beyond possible review when you regard it in the light of past experience.

Let me just ask this further question. This has been an extremely serious problem in my area, and that is the torts committed by military personnel. What happened in my district is that Navy personnel, after being rambunctious and rioting on the Great Lakes Navy Base and destroying a lot of Government property, then they broke out of the Navy compound and caused a lot of damage outside the Navy base. The question arises whether under the tort claims statute, whether there should be recovery against the Government for the tortious acts of those military employees?

Mr. BERMANN. Well, as I understand the initiative and its general architecture, it seems clear that the shift to exclusive governmental liability and the disciplinary mechanism that we have been talking about are expected to fit into the framework of the Federal Tort Claims Act. It didn't have to be that but it is. I suppose one would have to look at the Federal Tort Claims Act and its various exceptions to determine the scene of a particular tort is one for which the Federal Tort Claims Act could provide relief.

Mr. McCLORY. Those exceptions relate to acts committed by military while in the performance of a military function.

Mr. BERMANN. That is right. Your question raises the problem of the scope of employment and color of office, and it has always been a difficult decision for courts to determine in retrospect, whether an action that was taken may have been tortious within or without the scope of activity of the officials concerned. I don't suppose that bill is going to alleviate that problem but I wouldn't expect it to.

Mr. McCLORY. You feel we should perhaps define the scope of activity?

Mr. BERMANN. It is easier said than done.

Mr. SHATTUCK. Is not the scope of employment an accepted tort concept?

Mr. BERMANN. It certainly is.

Mr. SHATTUCK. It has been a basic jurisdictional requirement of the Federal Tort Claims Act for 30 years.

Mr. BERMANN. Certainly; and it is the basic concept in the private law of torts as well. There is no question about that.

My comment earlier about scope of employment was directed to the notion that constitutional torts, as I read the bill, a finding of governmental liability for constitutional tort, can take place either if the tort occurred while the official was acting within the scope of his employment or under color of office.

That expansion from scope of employment to color of office does not obtain, as I read the bill, in the case of common law torts, and I

find the distinction between color of office and scope of employment one that is going to be most difficult to establish, but I am in full agreement with you that we have to work with the notion of scope of employment and again this is not peculiar to our legal system. I find the very same concept of scope of employment systems I have studied from the point of view of the same substantive problem.

Mr. McCLORY. Scope of employment, not color of office?

Mr. BERMANN. Not color of office. Any legal system has to see to it that the Government doesn't pick up the tab on torts that are completely private and personal in every respect. There has to be a line somewhere.

Mr. DANIELSON. Mr. McClory did bring up the example of the military personnel who broke out of the naval base, I believe, and caused damage to property in the private sector. That is obviously not scope, at least as I see it, nor is it color, it is just what the insurance policies exculpate themselves of as a condition of riot.

Mr. BERMANN. I think that may well fall within the notion of scope of employment as well.

I would add for whatever purposes, it may interest you that the legal systems I did study I have had difficulty applying scope of employment just as our courts do in borderline cases, and at least one legal system has come to the view that whenever the tort is in any respect related to governmental employment, which is a broader notion than within the scope of employment, for example——

Mr. McCLORY. I think it is a most egregious negligence on the part of the Federal Government not to provide adequate security for maintaining order with respect to the military personnel within the base. So I would think there would be a clear case of tort liability without any legislation because of the sheer negligence.

Mr. BERMANN. That is a distinguishable tort. That is the tort of failure to supervise as opposed to the commission of injury that you have referred to.

Mr. McCLORY. I yield back the balance of my time.

Mr. DANIELSON. Thank you. I appreciate your comments very much.

While we are on the point, this question has come up before, and I would like to have your contribution. What is your perception of a constitutional tort?

Mr. BERMANN. I am familiar with many attempts to define it. My perception of it, and it is not as precise a perception as I would like, is a tort that could be defined as one that consists of violating a right secured by the Constitution. This is about as good a definition as I have seen of constitutional tort.

Apparently there is not uniform belief that every violation of any constitutional right is necessarily a constitutional tort. I gather both from the *Bivens* decision and from the *Passman-Davis* decision, which are the two Supreme Court decisions I know of recognizing constitutional torts, there is apparently a rather deliberate effort not to state the proposition, to avoid stating the proposition, that every violation of a right secured by the Constitution will give rise to a constitutional tort claim in damages.

Mr. DANIELSON. I thank you for your contribution, because I don't know what it is and we are trying to find out and maybe we

will be sufficiently intimidated by the different opinions to say nothing about it and follow the line of the courts here, but I just wanted it in the record.

In addition, another similar question, how do you define color of office?

Mr. BERMANN. It is a term I seldom find myself using but I would suppose it would refer to action taken by an employee of the Federal Government, in the context, or perhaps someone who isn't even an employee of the Federal Government but who holds oneself out to be an officer or employee of the Federal Government and holds oneself out to be taking action in that capacity.

Mr. DANIELSON. The color would be a subjective perception on the part of the tort victim, is that correct?

Mr. BERMANN. I think it is key to that.

Mr. DANIELSON. The circumstances would be such that the tort victim would have reason to believe that the feasor is acting within the scope of his authority?

Mr. BERMANN. Exactly. A parallel I suppose is the notion of apparent authority in the law of corporations, when we have the question of whether the corporation can be bound by a commitment made by somebody who held himself out to be an officer or director of it.

I think in all these cases we are concerned with the perception of the addressee of the action or statement involved and the reasonableness. In this sense it is objective. The reasonableness of the belief of, in this case, the tort victim.

Mr. DANIELSON. Objective but nevertheless the perception on the part of the person who is being victimized that he is justified in relying——

Mr. BERMANN. I suppose that is what is meant by color of office.

Mr. DANIELSON. I have also heard it ventured, and may we have your comments, that the Constitution after all is a limitation on, as well as a delegation of powers to, the Government and the only persons who can violate the Constitution or the only one who can, the only entity is the Government. Would you comment on that?

Mr. BERMANN. Well, the prevailing notion in the American constitutional law system is that the constitutional rights secured, for instance, in the Bill of Rights, are directed against the Government exclusively and not against private persons.

Incidentally, that is not necessarily the case. Again, both of the legal systems I know outside of the United States, the constitutional guarantees of equal protection, for instance, are guaranteed both against private parties and against Government, but the tradition in this Nation and the history of the Constitution that only the Government or I presume someone acting under authority or perhaps color of authority of the Government is constrained by the Bill of Rights.

To go beyond that, we need specific legislation such as the Civil Rights Act.

Mr. DANIELSON. You did mention, I think very correctly, that all violations of the Constitution are not necessarily considered to be constitutional torts. I suppose Mr. McCrory's citizens who had their property damaged by the rioting sailors, they were deprived of their property without due process of law, but nobody is going to

say it is a constitutional tort because we do have a well established principle that if you damage somebody's property you have committed a common law tort. Yet I think you probably violated the Constitution, if you want to be extremely technical about it.

Mr. BERMANN. I think there is a great potential for expansion of the notion of constitutional tort.

Mr. DANIELSON. We may not come to any conclusons on these points in our report so long as we can provide the remedy that we seek to provide.

Mr. BERMANN. In reviewing the legislation, the proposed legislation, I did try to put myself in your shoes and I came away with one conviction, and that is that I wouldn't suppose it would be an easy task or even an appropriate task, and I don't think you have undertaken it, to define what constitutional torts are or what constitutional torts are to exist and which ones are not to exist in the course of enacting this legislation.

Mr. DANIELSON. Right along with that, you pointed out that you were a little bit uncomfortable, at least, with the emphasis that is placed upon constitutional torts in this bill, that they seem to be considered as separate from common law torts. I got that feeling from your statement.

Mr. BERMANN. Yes.

Mr. DANIELSON. What would be your attitude toward just forgetting this distinction and just letting them all be torts?

Mr. BERMANN. I rather think I would do precisely that. I say that because I have examined with some care each of the areas in the legislation where the legislation is directed exclusively to constitutional torts, and no mention is made of common law torts, and with respect to each and every one of those distinctions, whether it is liquidated damages, whether the right to trigger the disciplinary mechanism that I referred to earlier, I asked myself whether there was a good policy reason for insisting that these litigation advantages, so to speak, are reserved to the victims of constitutional torts.

And, second, assuming I can assess difference in importance between constitutional torts and nonconstitutional torts, from a point of view of the tort victim, which I have great difficulty doing. I am again troubled by the workability of the distinction, the notion that virtually any physical act can be viewed, if one strains, in terms of the constitutional violation.

Taking this practical concern I have, together with the relative absence I see of a compelling reason to limit the liquidated damages provision or to limit the attorney fees proceedings or to limit the triggering mechanism provision of the constitutional torts, and withhold it from common law tort victims, both of these perceptions lead me to believe that we would lose not very much and again, I think a good deal more in terms of streamlining, which I think is what this piece of legislation is all about, largely, if we did not make the constitutional nonconstitutional dicotomy a cornerstone of this piece of legislation.

Mr. DANIELSON. Could we not thereby also avoid the need to define a constitutional tort, which is bound to be a threshold issue in some litigation?

Mr. BERMANN. I should think so very much. The more we make the substantive and remedial provisions of this legislation depend upon the description of a tort as constitutional and nonconstitutional, I think the more difficulty we are going to run into and I fail to see any serious countervailing reason for undertaking that problem.

Mr. DANIELSON. As far as the tort victim is concerned, as I understand it, the whole theory of torts since time immemorial has been to make the injured person whole and to have the tortfeasor make him whole.

Mr. BERMANN. Precisely.

Mr. DANIELSON. And I don't think it makes a lot of difference to the victim whether he is kicked by a horse or a mule, if he is kicked. That is the point, isn't it, pretty much?

Mr. BERMANN. That has been my understanding. I should add, however, that tort law has had at least a subsidiary purpose, conceived to have a subsidiary purpose, which is the setting of standards of care, thereby deterrence.

Mr. DANIELSON. That is the so-called deterrent effect?

Mr. BERMANN. That is right, and it is this deterrence problem that, of course, perpetuates the entire problem we are addressing, this problem of overkill, in deterrence, yet having sufficient deterrence to prevent preventable injuries.

I do believe that compensation of the tort victim is an important goal, and if it were possible, and I think it would be, to perfect the problem of compensating tort victims by removing the deterrent purposes of tort law, to a subsequent phase, such as the disciplinary phase, that I see incorporated into this piece of legislation, I think the compensatory purposes would be better served.

I fail to see how a judge or jury can focus squarely on the compensation problems which are complex enough without having to worry at the very same time whether the amount of damages imposed is going to squelch needed governmental initiatives.

Mr. DANIELSON. Do you feel that the state of affairs, things that have come to your attention, justify a feeling that the administrative agency, the executive branch agency, will not take appropriate disciplinary proceedings unless we mandate that they do so?

Mr. BERMANN. I have done no primary research but the secondary sources I have consulted have all made references to the rather disappointing performance of the Civil Service Commission, the former agency, in terms of civil service discipline, and I think it should be a sine qua non, as I stated earlier, of enactment of such a piece of legislation.

I think eliminating officer liability without putting in its place a reliable and effective mechanism for deterrence, such as the disciplinary amendments, would be a mistake.

Mr. DANIELSON. You may be entirely right. Personally, my own structure is such, the marrow of my bones is such, that I don't think it is necessary, but I might be wrong, because almost everybody I talk to disagrees with me, and I have lived long enough to know that I can be wrong.

Mr. BERMANN. I might add, though, this is only by way of endorsement of views that have been already expressed, that the shift from governmental, from officer to governmental tort liability in

the foreign legal systems I know have all been accompanied by a strenthening of the civil service disciplinary system.

Mr. DANIELSON. I like to think the foreign countries are pretty far behind us in most things. So that doesn't persuade me very strongly. However, I know that I am outnumbered, not only by the populace but also by the committee.

So when we come to the discipline I will try to do a good job. I don't see any track record that the executive branch agencies have failed to take disciplinary action in a proper case, and I just feel that we are treading in an area where we really don't have much business, when we tell them to discipline their employees in a certain way. But I am often outvoted and I probably will be again.

Mr. BERMANN. It does seem to me that the disciplinary amendments leave a great deal of leeway and are built upon concepts that are exceedingly vague and will inevitably leave a great deal of discretion to the agency head.

Mr. DANIELSON. I am not quarreling with you because I respect your opinion. I don't really respect mine too much. I have been shot down too often. But bear in mind, please, that drivers, post office drivers, for example, have immunity for themselves now, and physicians, surgeons, from medical malpractice. I don't know of any discipline that is mandated. Have we had any bad results?

Mr. BERMANN. Well, I am not sure about the incidence of these kinds of accidents occurring. I think it is fair to say these two cases were carved out probably because, as a statistical matter, a postal driver is bound to have a traffic accident sooner or later if he spends his life driving a Government vehicle.

Mr. DANIELSON. I would say an investigating officer is bound to make a bum arrest once in a while or have some kind of error in the execution of a warrant.

Mr. BERMANN. I am not so sure that is a tort.

Mr. DANIELSON. May I yield to the distinguished gentleman from Virginia, Mr. Harris, and meanwhile, thank you very much.

Mr. HARRIS. Thank you, Mr. Chairman.

I appreciate your statement. My car did get backed into by a Postal Service truck.

Mr. DANIELSON. This morning?

Mr. HARRIS. There were several other things happened this morning, Mr. Chairman.

I have no questions.

Mr. DANIELSON. I won't hesitate in asking another.

You mentioned guidelines on disciplinary proceedings. We hear constantly complaints that there is overregulation and too many regulations and the regulations are tying down Gulliver, yet I have observed every time we start, in legislation, going beyond the blueprint, and start putting in the tiny little specifications, we compel more and more regulations. Every little thing that we specify in the legislation has to be fleshed out by the agencies in their regulations. I just wonder sometimes if we aren't going a little too far from the blueprint in our legislation and injecting ourselves into what is truly an executive branch function?

Let me have your comments on that.

Mr. BERMANN. My comments are I actually have sympathy with the notion of the Government overregulation but I don't see this

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area in which I and other witnesses have called for greater guidelines as a typical example of that.

This is not, as I understand it, a Congress telling an agency what to do, what regulations to promulgate, how to regulate a certain sector of the economy, but simply setting out some general notions of what should be considered to constitute action worthy of discipline, whether it be a specification of the notion of malice, or a specification of the notion of recidivism, repeated commission of a similar tort. That is not the kind of overregulation and constriction and constraint of the private sector of the economy that I think perhaps, not you, but a great many critics of Government regulation have in mind when they refer to overregulation by Washington.

I may be mistaken but I suspect that——

Mr. DANIELSON. I am at a different stage. My thoughts are not fully developed at this point but I attribute a good deal of regulation to overlegislation.

Mr. BERMANN. Yes, sir.

Mr. DANIELSON. The more we legislate, the more the agencies must regulate, and that is where I kind of wonder if we don't have a good point to keep in mind, that is what I am talking about.

Getting back to discipline, because this is what I am talking about, suppose we just tell the agency that if you are going to have a disciplinary process it can be triggered by the tort victim, et cetera.

We know that about the least they can do is to have the agency head call the tortfeasor in on the carpet and say shame on you, or words to that effect, and put a letter in the personnel file, don't give Jon a raise next year, or something like that. The worst they can do is fire him, just out of hand.

We should have some provisions perhaps to have some kind of civil penalty. But that is as far as we go. We are not going to put them in jail or any other such thing.

Mr. BERMANN. Unless, of course, he has committed a criminal offense.

Mr. DANIELSON. But that would be for violation of a criminal statute, not under the Tort Claims Act.

Mr. BERMANN. Yes, sir.

Mr. DANIELSON. Criminal acts are not included in the Tort Claims Act.

Mr. BERMANN. Yes, sir.

Mr. DANIELSON. Under the Tort Claims Act that is as far as you go. I think if we tell an agency to impose an appropriate disciplinary penalty, somebody has to decide what that is. That is, somebody who knows the case, not this committee sitting here, in a vacuum, we don't know the facts of what took place. Somebody has to pass on that, and that somebody ought to know what the case is all about, all the circumstances, the aggravating circumstances, the mitigating circumstances, and then be some kind of executive department Solomon and impose the appropriate discipline.

But I don't think that we here in Congress are qualified to do that, nor should we invade an area where we don't really know what we are talking about. We know the parameters, the scolding, discharge, but that is about it.

Mr. BERMANN. I would think Congress should not go any further than specifying whether such features of the incident as possible, malice or recklessness, should be taken into consideration in weighing the sanction to be imposed. That is about as far as I manage to go.

I fully agree with your notion that the application of a general notion such as these to the facts of a specific controversy, a specific tort, are ones that are best left in this case to agency head who is going to conduct a hearing, as I understand it, and compile a record.

Mr. DANIELSON. Perhaps if we had such kind of language imposing the penalty the agency person doing so shall take into consideration all of the mitigating and aggravating circumstances of, which is the equivalent of really saying nothing, but that would be——

Mr. BERMANN. I think one could go a bit further and speak in terms of good faith. I think that, for example, is a term that has been construed as often by the courts as scope of employment. It may be a conceptual phrase but it is one that our courts are accustomed to dealing with. I wouldn't mind seeing that kind of phrase built into the disciplinary amendments and I wouldn't think we are hamstringing the agency by doing so.

Mr. DANIELSON. What was your phrase?

Mr. BERMANN. The relevance of good faith in terms of imposition of discipline.

Mr. DANIELSON. I thank you there because we will come to this bridge real soon.

I am going to yield back to Mr. Harris, who has with a question.

Mr. HARRIS. The one question in the context of the bill that has given me some concern is the use of the phrase "within the scope of his office or employment or color of their office." You make reference quite frankly in your statement to "within the scope of his office or employment" but you don't include the phrase that is in the bill someplace—if it is not in the bill, other places—"color of their office."

I was wanting to get your opinion whether or not you felt inclusion of the term "color of their office" maybe makes the application too broad?

Mr. BERMANN. I think to some extent we covered this a little bit earlier. As I read the bill, it was not an accident, it was not fortuitous that color of office is absent from the language until one reaches the constitutional torts. It is I have supposed, intentional that the Government be made exclusively liable under this piece of legislation only for common law torts committed within the scope of the employment or office of the individual but that the Government be made exclusively liable also for constitutional torts even when they are not within or did not relate to action within the scope of the employment of the individual but also relate to actions taken by him under color of office.

I also explained what I conceived to be the difference between color of office and scope of employment and admitted to not having a much better definition than I am sure you are already aware of.

I have the conviction that scope of color of office will reach cases that would not fall within the notion of scope of employment, and this departure from the notion of scope of employment would have

something to do with the subjective and objective factors that we mentioned a little while ago.

Mr. DANIELSON. We were talking a while ago about an apparent tort being a kind of a log.

Mr. BERMANN. In short, what troubles me at least as much as the distinction between scope of employment and color of office is the fact that this bill, as I understand it, makes the scope of the Government's liability depend upon whether we have a constitutional tort or a common law tort, and that troubles me as much as the first distinction you have alluded to.

Mr. HARRIS. Thank you, Mr. Chairman.

Mr. DANIELSON. Mr. Kindness of Ohio.

Mr. KINDNESS. Thank you. I apologize for not being able to be here earlier and I do not have any questions at this time. I certainly appreciate your contribution to our consideration on this, Professor.

Mr. DANIELSON. Thank you.

Mr. McClory.

Mr. MCCLORY. I have no further questions, Mr. Chairman, thank you.

Mr. DANIELSON. Professor Bermann, you have answered everything we have put to you. I thank you very much for your contribution. I realize that in addition to your statement, you have referred us to previous writings of your own, as has Mr. Civiletti, incidentially, of the Justice Department. So you have a contribution in this bill. Thank you very much.

Mr. BERMANN. Thank you very much for hearing me.

Mr. DANIELSON. Our next witness will be Ruth T. Prokop, Chairperson of the Merit Systems Protection Board. Won't you please come forward.

Ms. PROKOP. Thank you very much.

TESTIMONY OF RUTH T. PROKOP, CHAIRWOMAN, MERIT SYSTEMS PROTECTION BOARD, ACCOMPANIED BY JANE EDMISTEN, DEPUTY GENERAL COUNSEL

Ms. PROKOP. Mr. Chairman and members of the subcommittee, I wanted to apologize to you for being tardy this morning. I just happened to have gone to the wrong building, so if I caused any inconvenience——

Mr. DANIELSON. The wrong building is very understandable around here, even the wrong room. We are delighted to have you with us and would you please identify your associate for the record.

Ms. PROKOP. Yes, I will. Thank you very much. To my left is Ms. Jane Edmisten, who is Deputy General Counsel of the Merit System Protection Board. I am very pleased to appear before you.

Mr. DANIELSON. If I may, without objection, Ms. Prokop's statement will be received in its entirety in the record, but you may read it or you may just speak ad lib, at your pleasure.

[The prepared statement of Ms. Prokop follows:]

STATEMENT OF RUTH T. PROKOP, CHAIRWOMAN, MERIT SYSTEMS PROTECTION BOARD

Mr. Chairman and members of the subcommittee, I am pleased to appear before the Subcommittee to express the position of the Merit Systems Protection Board in support of H.R. 2659, a bill to amend the Federal Tort Claims Act.

I believe that the proposal put forth by the Department of Justice represents a realistic and feasible effort to address the need to compensate individuals whose Constitutional rights have been violated and to ensure that our public employees are held accountable for their actions. These are important objectives and we, as government officials, share in the responsibility of seeing that they are met.

Substitution of the Federal Government in a Constitutional tort claim action, where the Attorney General has certified that the employee was acting within the scope of his employment, consitutes a desirable method of meeting the compensation obligation. It also provides a more equitable means of ensuring that public employees are accountable for their acts. Rather than holding the threat of costly civil liability over an employee's head, a uniform system of disciplinary procedures would be imposed. Federal employees would be encouraged to pursue their assigned tasks without fear of false accusations or harassment but with the knowledge that misconduct would invite disciplinary action against them.

I have carefully reviewed the remarks of those who have preceded me before this Subcommittee on this legislation and on its predecessor, H.R. 9219, during the last Congress. There has been a full discussion of the contemplated process, and a thorough airing of the issues surrounding this legislation. I do not feel it would be beneficial to this Subcommittee for me to restate those issues. Instead, I would like to concentrate on Section 8 of the bill which creates an employee disciplinary proceeding.

While strongly supporting what the Department of Justice is proposing to do through this legislation, I have concluded that the bill may contain flaws that should be corrected and provisions that should be clarified. As drafted, the disciplinary procedures seem to be unnecessarily complex and in some instances inadvertently create other problems. I believe there may be a simpler way to achieve the goals of this bill while accommodating many of the concerns raised by other witnesses.

Perhaps the easiest way for me to express my concerns is by summarizing the most troublesome aspects of the bill and in some instances suggesting possible solutions to be considered by the Subcommittee.

ADMINISTRATIVE INQUIRIES

I will turn first to the issue of due process requirements in administrative adjudications. I would note that it is well-established in the case law that the procedures followed by an agency may vary from the formal, on-the-record proceeding involving an oral hearing, to an informal proceeding where there is no hearing at all. Agencies may exercise broad discretion in resolving conflicts and are not confined to ordinary concepts embodied in court rules. Nevertheless, it is indisputable that they may not merely use any procedures they see fit. Accordingly, in order to meet due process requirements and to provide complete records for the reviewing body, the administrative inquiry at the agency level should, at a minimum, embrace the following elements:

Notice to the employee;

Full opportunity to present his/her own affirmative case; and

Complete apprisal of the source and substance of all adverse information to be considered, and an opportunity to respond in writing.

As drafted, I believe the bill may not accommodate some of these concerns. For example, Section 2684 provides for an agency procedure that may or may not permit all parties to respond and examine witnesses and yet directs the reviewing body to conduct its review on-the-record. Such a procedure might be subject to objections that it falls short of the standards outlined above.

Although it does not rise to the level of a due process concern, I am also troubled by the failure to impose a reasonable time constraint on the processing of administrative inquiries. I fully recognize that some inquiries will require more time than others; however, it is not only appropriate but in line with current administrative trends to impose a reasonable time limit on inquiries conducted at the agency level. I would suggest that the Committee consider a 120-day limit on the agency inquiry similar to the limits imposed under the Civil Service Reform Act. Upon expiration of the 120 days, the person requesting the inquiry could seek an administrative review.

TRIGGERING MECHANISM

My second area of concern relates to the system for triggering the administrative inquiry and its potential for encouraging duplicative and inadequate reviews. Let me recapitulate the operation of the three-stage triggering device. Clearly the bill contemplates three points at which a complainant may initiate the disciplinary inquiry. First, a complainant who accepts an administrative award under 28 U.S.C.

§ 2672 may, within 60 days after accepting the award, trigger the disciplinary inquiry. Alternatively, if the complainant does not accept the administrative award but instead files an action for a judicial determination under 28 U.S.C. § 1346(b), he/she may, within 60 days after final judgment awarding money damages, request an inquiry. These two alternatives create no conceptual difficulty for me.

However, I perceive extraordinary problems under the third alternative contained in Section 2683(b), which would permit a complainant to initiate an inquiry at any time between 60 and 120 days after a Section 1346(b) complaint was filed.

Any individual electing this third procedure could receive a decision that is based on an incomplete record and is subject to no independent review outside the agency. This is so because the procedure afforded to complainants choosing this alternative may be truncated. As the Justice Department acknowledges, the absence of completed litigation or administrative settlement may cause an agency disciplinary inquiry to suffer from inadequate development of the facts. Moreover, the bill, as drafted, requires the agency to consent to any request for administrative or judicial review of the result of the agency inquiry during the pendency of litigation. Since an agency has an understandable interest in protecting its employees and in shielding its determination processes from further scrutiny, it is not likely to grant such consent to review.

I fully understand the concerns of those urging that a complainant be provided an early opportunity to initiate a disciplinary inquiry. I also appreciate the undue delays that often characterize tort claim litigation. Nonetheless, I urge this Subcommittee to consider carefully whether the interest in expediting disciplinary inquiries outweighs the interest in a full, complete and consistent administrative process. One must question the advisability of creating a process that would not afford all complainants and employees equal access to a complete procedural inquiry, an independent administrative review and judicial review before a Court of Appeals. Any other processing system fails to permit those who suffer Constitutional torts to fulfill their essential role as catalysts in activating and pursuing the accountability process.

Ms. PROKOP. Thank you very much.

There are some parts of it I feel that I can skip and put into the record, otherwise I would like to go through it for continuity on some points, if I may.

Mr. DANIELSON. All right.

Ms. PROKOP. As I stated in my opening paragraph, I believe that the proposal put forth by the Department of Justice represents a realistic and feasible effort to address the need to compensate individuals whose constitutional rights have been violated and to insure that our public employees are held accountable for their actions. These are important objectives and we, as Government officials, share in the responsibility of seeing that they are met.

Substitution of the Federal Government in a constitutional tort claim action, where the Attorney General has certified that the employee was acting within the scope of his employment, constitutes a desirable method of meeting the compensation obligation. It also provides a more equitable means of insuring that public employees are accountable for their acts. Rather than holding the threat of costly civil liability over an employee's head, a uniform system of disciplinary procedures would be imposed. Federal employees would be encouraged to pursue their assigned tasks without fear of false accusations or harassment but with the knowledge that misconduct would invite disciplinary action against them.

I have carefully reviewed the remarks of those who have preceded me before this subcommittee on this legislation and on its predecessor, HR 9219, during the last Congress. There has been full discussion of the contemplated process, and a thorough airing of the issues surrounding this legislation. I do not feel it would be beneficial to this subcommittee for me to restate those issues.

Instead, I would like to concentrate on section 8 of the bill which creates an employee disciplinary proceeding.

While strongly supporting what the Department of Justice is proposing to do through this legislation, I have concluded that the bill may contain flaws that should be corrected and provisions that should be clarified. As drafted, the disciplinary procedures seem to be unnecessarily complex and in some instances inadvertently create other problems. I believe there may be a simpler way to achieve the goals of this bill while accommodating many of the concerns raised by other witnesses.

Perhaps the easiest way for me to express my concerns is by summmarizing the most troublesome aspects of the bill and in some instances suggesting possible solutions to be considered by the subcommittee.

Administrative inquiries: I will turn first to the issue of due process requirements in administrative adjudications. I would note that it is well established in the case law that the procedures followed by an agency may vary from the formal, on the record proceeding involving on oral hearing to an informal proceeding where there is no hearing at all. Agencies may exercise broad discretion in resolving conflicts and are not confined to ordinary concepts embodied in court rules.

Nevertheless, it is indisputable that they may not merely use any procedures they see fit. Accordingly, in order to meet due process requirements and to provide complete records for the reviewing body, the administrative inquiry at the agency level should, at a minimum, embrace the following elements: Notice to the employee; full opportunity to present his/her own affirmative case; Complete appraisal of the source and subtance of all adverse information to be considered, and an opportunity to respond in writing.

As drafted, I believe the bill many not accommodate some of these concerns. For example, section 2684 provides for an agency procedure that may or may not permit all parties to respond and examine witnesses and yet directs the reviewing body to conduct its review on the record. Such a procedure might be subject to objection that it falls short of the standards outlined above.

Although it does not rise to the level of a due process concern, I am also troubled by the failure to impose a reasonable time constraint on the processing of administrative inquiries. I fully recognize that some inquiries will require more time than others; however, it is not only appropriate but in line with current administrative trends to impose a reasonable time limit on inquiries conducted at the agency level. I would suggest that the committee consider a 120 days, the person requesting the inquiry could seek an administrative review.

Triggering mechanism: My second area of concern relates to the system for triggering the administrative inquiry and its potential for encouraging duplicative and inadequate reviews. Let me recapitulate the operation of the three-stage triggering device. Clearly the bill contemplates three points at which a complainant may initiate the disciplinary inquiry. First, a complainant who accepts an administrative award under 27 U.S.C. 3672 may, within 60 days after accepting the award, trigger the disciplinary inquiry.

Alternatively, if the complainant does not accept the administrative award but instead files an action for a judicial determination under 28 U.S.C. 1346(b), he/she may within 60 days after final judgment awarding money damages, request in inquiry. These two alternatives create no conceptual difficulty for me.

However, I perceive extraordinary problems under the third alternative contained in section 2683(b), which would permit a complainant to initiate an inquiry at any time between 60 and 120 days after a section 1347(b) complaint is filed.

Any individual electing this third procedure could receive a decision that is based on an incomplete record and is subject to no independent review outside the agency. This is so because the procedure afforded to complainants choosing this alternative may be truncated. As Justice Department acknowledges, the absence of completed litigation or administrative settlement may cause an agency disciplinary inquiry to suffer from inadequate development of the facts.

Moreover, the bill, as drafted, requires the agency to consent to any request for administrative or judicial review of the result of the agency inquiry during the pendency of litigation. Since an agency has an understandable interest in protecting its employees and in shielding its determination process from further scrutiny, it is not likely to grant such consent to review.

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My third concern, and I might say a very major concern to me personally, relates to the standards to be applied by the Board when reviewing the administrative inquiry and any resulting disciplinary action.

Section 2684(c) requires that the Board determine on the basis of the record whether the action taken was reasonable.

As the Department of Justice noted in its section-by-section analysis, if an agency is reasonable in deciding whether and how to discipline an employee, the Board would be required to uphold that decision.

In contrast, section 2688(a) provides that nothing in the procedures set forth in sections 2683–2687 "shall affect the rights of an employee to appeal or to seek review or other means of redress of any disciplinary action" available under any other provision of law.

I would suggest to you that these two provisions are inherently inconsistent. Section 7701(c)(1)(B) of title 5 U.S.C. requires the Board to determine that an agency decision is "supported by a

preponderance of the evidence" in adjudicating appeals other than those based upon unacceptable performance.

This is a higher standard of review than that required under the reasonableness test proposed in section 2684. Should the Board be required to apply the reasonableness standard in a section 2684 proceeding, the employee's right to a higher standard of review under title 5 would be adversely affected.

Another problem arising from the inconsistency of these two provisions is the potential for inconsistent Board decisions. Section 2686 appears to require that the Board entertain both a complainant's request for review of an agency disciplinary inquiry and an employee's adverse action appeal under title 5.

As a result, the Board could be required to apply two standards of review, that is, reasonableness and preponderance of the evidence, to the same operative facts. In such event, the Board might be compelled to reach inconsistent decisions.

This dilemma could be resolved if the committee adopted one of the following approaches: (1) Forego the lower standard of review embodied in section 2684 and adopt the higher standard of preponderance in 5 U.S.C. section 7701(c)(1)(B); or (2) amend section 2688(a) to provide that the review rights otherwise available to an employee under title 5 be diminished in this single regard in order to accommodate the legitimate legislative desire for greater employee accountability in cases where the constitutional rights of citizens have been violated.

In the event the subcommittee prefers the latter approach, I would further urge it to consider deleting the reasonableness standard in section 2684 and substituting a substantial evidence standard. The Board is required to apply this latter standard when adjudicating unacceptable performance appeals under 5 U.S.C. section 7701(c)(1)(A). Both the "reasonableness" and the "substantial" standards are lesser standards than "preponderance". The adoption of an identical standard in this bill would eliminate a potential source of confusion.

Either approach would permit the desirable result of merging the adverse action and the disciplinary inquiry into a single proceeding before the Board.

Additionally, such a merger would diminish the likelihood of duplicative proceedings. As indicated above, the Board could review two individual appeals arising out of the same operative facts: a complainant's request for a review of the agency administrative inquiry and the employee's appeal pursuant to title 5.

For example, an agency might conduct an administrative inquiry and suspend the employee for engaging in conduct violating the complainant's constitutional rights. The employee might challenge that suspension under title 5 while the complainant might challenge the suspension as inadequate under the provisions of this bill.

The Board would then have before it two cases arising out of the same operative facts. Only if the Board were authorized to apply the standard of review to both actions could it merge the two proceedings and avoid duplicative efforts and inconsistent results.

The merger at the administrative level would also reduce the potential for inconsistent judicial treatment of such cases. Under

this bill two related actions might be pending simultaneously in various courts with potentially divergent results.

The Department of Justice acknowledges, for example, that a petition for review of a Board decision on an agency disciplinary inquiry might be pending in one circuit, while a petition for review of a Board decision under title 5 which arises out of the same operative facts might be pending in another circuit, or in the Court of Claims.

Since this bill provides a different standard of review than the one provided in the Civil Service Reform Act, it is conceivable that the court reviewing the agency disciplinary inquiry might sustain it, while the court reviewing the employee appeal might overturn it.

If the review of the inquiry and the employee appeal were merged at the administrative level, reliance on comity between the courts to resolve such inconsistencies would be unnecessary. Such an approach would greatly simplify the process envisioned by the bill while preserving all the substantive rights of the parties.

In any event, I would strongly urge that the Board's existing procedures be applied to its review of all administrative inquiries under H.R. 2659. I am convinced that with minor revisions the adoption of those Board procedures would meet many of the complaints lodged against this bill.

For example, any person requesting Board review would be entitled to a full hearing, including the right to present evidence and cross-examine witnesses; certain discovery rights, and expeditious processing of the case.

Having suggested methods of eliminating what I perceive to be unduly complex and procedurally inadequate provisions in this bill, I would now like to comment briefly on the provisions relating to the imposition of penalties against an employee who has committed a tortuous act and the lack of any meaningful enforcement mechanism.

The bill defines disciplinary action as "removal, suspension without pay, reduction in pay, admonishment or reprimand, or transfer." I assume, therefore, that this subcommittee contemplates the imposition of penalties that approximate those assessed against other Federal employees under title 5 who have engaged in misconduct.

While I agree that there must be sufficient flexibility to tailor the penalties to the particular misconduct in question, notions of equal protection and essential fairness suggest that all Government agencies and reviewing bodies should impose comparable punishment for the commission of comparable acts.

Since the Merit Systems Protection Board will be reviewing most of the disciplinary actions taken under this bill as well as appeals under title 5, it will be in a position to give effect to the goal of equal punishment for similar offenses.

However, section 2688(c), which precludes the Board from reducing the severity of an agency's disciplinary action against an employee who has no independent right of Board review, that is, an excepted employee, would seriously dilute the Board's ability to forward this goal.

I understand the policy considerations which led to the inclusion of section 2688(c). However, the failure to require the imposition of uniform sanctions on employees engaging in similar misconduct seems almost impossible to justify. Accordingly, I urge that the subcommittee strike this subsection.

Further, I would suggest that the need for uniform penalties and consistent procedures argues against the designation of additional reviewing bodies under section 2686.

Specifically, I would urge all administrative reviews and inquiries involving officers and employees of the Foreign Service and Public Health Service personnel be conducted by the Merit Systems Protection Board. I can find no rationale for these two exceptions to Board jurisdiction since inquiry and review by it would avoid so much as an appearance of agency conflict.

Next, I would like to comment briefly on the absence of an enforcement mechanism in H.R. 2659. The ultimate utility of a reviewing body's order is meaningless unless that body has sufficient powers of enforcement.

In order to insure that accountability is more than an empty promise, the reviewing body should be provided with a mechanism for enforcement of its orders. For that reason I urge that the subcommittee consider adopting an appropriate method of exacting compliance.

I am going to skip a couple of technical comments that I have but I would like to comment on one provision that is important, section 2687, which provides that the Merit Systems Protection Board will not be effective unless approved by the Attorney General.

I was listening earlier to Mr. McClory and having been a general counsel before coming to the Board, I understand fully his position.

I think this bill goes very far in addressing many of those problems and I do believe, however, and am hoping that the recommendations which I have made to you this morning will assist the subcommittee in protecting the legislation that I believe can give public employees an unbiased and consistent review and assures the injured party and the public that Government officials will be held accountable for their actions.

This concludes my prepared statement. I will be very pleased to answer questions.

Mr. DANIELSON. Thank you very much. I will yield to the gentleman from Ohio, Mr. Kindness, for his first inquiry.

Mr. KINDNESS. Thank you, Mr. Chairman.

I thank you for your very helpful comments this morning, Ms. Prokop.

The question of the right to counsel by the employee involved in disciplinary proceedings under this bill keeps coming up; and I would like to clarify what your thoughts are in that respect.

Will you point out any exceptions to the right to counsel that you think would be appropriate, or should the right to counsel be there at any and all stages of the disciplinary proceedings?

Ms. PROKOP. If I might comment on that in two parts, sir, I think as far as any proceedings before the reviewing body, I am convinced that our rules and regulations are very good ones, we always allow counsel, I think it is a good thing.

I would be very opposed to removing our normal regulations from that process.

With respect to the initial inquiry at the agency level, I think that the question could be responded to in one of two ways. I think it depends on what kind of proceeding that you have at the agency level. Certainly if there is a hearing at the agency level, I do believe, given the interest of the person being charged with whatever he is charged with, he or she should have counsel present.

I think I would come down saying that the presence of counsel is a very necessary thing given the charges that could result. I presume we are talking against the employee against whom disciplinary action is taken or would you also ask that question with respect to a complainant?

Mr. KINDNESS. No. I was thinking particularly with respect to the employee. To pursue that one further step, if the agency inquiry is of a somewhat informal nature but is instigated by a complaining party, and that complaining party can participate in any degree in that preliminary inquiry, what would be your position with respect to the right of counsel on the right of the employee under those circumstances?

Ms. PROKOP. Under those circumstances, I believe the employee should be given the right to counsel.

Mr. KINDNESS. One of the situations that exists that gives us some difficulty is in the FBI where there is not a right of appeal from a disciplinary action except in the case of a veteran.

Do you have any particular comments about concerns in that area in the light of what is proposed in this bill?

Ms. PROKOP. As I mentioned in my prepared statement, it is my understanding that it is that concern that underlies the provision that would not allow the reviewing body to reduce the penalty provided by the agency.

I can understand and truly appreciate the concern of organizations or entities like the FBI that their authority not be undermined if indeed they are to take strong disciplinary action.

I looked at that carefully. I don't believe, though, that rationale can carry forward as to kind of put a system out of sync. I think that is what troubled me about it.

The arguments were not persuasive enough because that is making a presumption that the reviewing body would do something foolish. I didn't find that persuasive.

I think underscoring the bill, though, and obviously the decision was made by the drafters that by allowing employees to have rights to appeal under this bill they would not normally have, I would endorse that.

Basically I think that concept, as embodied in this bill, is very good, given the nature of what the person is being charged with.

Mr. KINDNESS. Are you aware of other circumstances where the right of appeal is not available in other agencies comparable to the FBI? I don't think we have had any brought to our attention.

Ms. PROKOP. You would have the armed services and the intelligence community which would essentially have the same exclusion from our jurisdiction at the present time.

Mr. KINDNESS. In the case of the armed services, there is a separate system.

Ms. PROKOP. Yes.

Mr. KINDNESS. As to the intelligence services, CIA, NSA, are they subject to no review?

Ms. PROKOP. We do not take jurisdiction over them.

Mr. KINDNESS. I thank you very much for your helpful testimony and your responsive answers.

Mr. DANIELSON. Thank you. I associate myself with Mr. Kindness' remarks. Your presentation has been very helpful and has addressed several questions that have come up without a definitive answer.

In the last Congress, Judge Webster was a new director at the FBI and he did appear before this subcommittee. His concern was not that your agency would do something foolish. He quite clearly expressed, as I recall it, that his concern was that he must have respected discipline, and that when discipline was imposed he felt it should not be reduced because if it was subject to being reduced, that would weaken his line of authority.

I am sure he wasn't thinking of a foolish act on your part but he was concerned that he have very strong authority in imposing discipline and thereby directing his agency.

Ms. PROKOP. I agree and I didn't mean to particularly pose it in that light. I think it is a serious concern. I had hoped to express that.

I apologize to you but you can't really have it both ways. If there is a strong enough rationale to convince Congress that the FBI should not be scrutinized in such a manner, I think that is the decision Congress should make.

I think, though, to say that we will let you look at it—I don't care who the reviewing body is not just speaking of the Board, I could be speaking of another reviewing body—that prejudges the decision of the board as to whether indeed that decision was fair.

I apologize. I have the highest regard for Judge Webster, but perhaps his authority was exceeded in some instance and perhaps it is not based on fact. I think any member of the executive branch should be subject to such scrutiny whether it is by court or by a reviewing body.

Mr. DANIELSON. Well, we can always fire him. That is pretty strong discipline too.

I am going to make a request of you. You pointed out very well in your statement a number of criticisms of the structure of the bill as it is written. I thank you for it. I wonder if you would be willing to prepare some proposed amendments which would give effect to the suggestions which you have made.

I will not at all guarantee that they will be adopted in whole or in part but it certainly would be helpful to the subcommittee as we go through markup to see how they would impact the bill.

You and your counsel have in your mind far better than we precisely what you would seek to achieve by those changes. Although we have magnificent counsel, I know they would like to have your help, and I would, so if you would be willing, I would appreciate it very much.

Ms. PROKOP. We certainly would be willing to sit down with your counsel to submit proposed language for their consideration and

help you in any manner possible, and I will say when this bill came up that the board did not have an opportunity to comment on it.

I want to make very clear that the Department of Justice has been very cooperative with us in helping us understand the provisions of the bill. I think that this is not a position adverse to that proposed by the Department of Justice. It is merely to clarify since we did not have an opportunity to sit at the table. So we would be delighted to provide that.

Mr. DANIELSON. Let me dispel any concern of that from your mind. Justice has done an excellent job of assisting in putting this bill together but we have the final responsibility for writing it and for putting it through the committee and the floor and we accept that responsibility.

Although we have tremendous respect for and enjoy the help of the Justice Department, we look for help from wherever we can get it.

I have one more question only and this relates to assumptions. Professor Bermann commented that perhaps we could have some guidelines for the disciplinary procedure. I believe you were present so you probably heard that. Would you give me your opinion on that?

Ms. PROKOP. Yes. As I stated in my testimony, I think that in this area of law you need a great deal of flexibility in applying the standards. You could list your sanctions but you need an opportunity and some flexibility to tailor those sanctions to fit the particular action.

I would not object. I think the more assistance that you can get from Congress, just dealing with a new statute myself, in defining standards without being too confining, is very helpful. So I heard a couple of the areas you and the professor were talking about. I think areas in terms of definition is very helpful to people trying to interpret the statute after the fact.

I would not be in favor of legislation that would be so specific if *x* act is committed, this punishment must be applied to that particular act. I don't think the facts of any case permit you to prejudge that kind of thing. But as far as giving further definition and meat, so to speak, to the standards, I think that would be very helpful.

Mr. DANIELSON. Perhaps we could approach that by having a paragraph in the committee report that accompanies the bill setting forth the attitude of this committee toward that subject.

Ms. PROKOP. I have spent the past year trying to interpret a new statute and we are trying to do what Congress wanted us to do. It is very difficult sometimes when you do not have guidance in areas where you really need it.

I am not at all opposed to more specific guidance in committee reports. I think it is very helpful to the administrator. I just cannot help responding to the professor, if I may, on one item. I am hopeful that his references to the conduct and the handling of cases of the former Civil Service Commission will be reversed as soon as he has an opportunity to examine the way the Board is now conducting.

Mr. DANIELSON. I think you people should get together and talk about this item of mutual interest.

I will yield to Mr. Harris.

Mr. HARRIS. Thank you, Mr. Chairman.

May I apologize? An emergency came up and I was not able to hear your testimony. I will read the rest of it. I do understand you have some problems with regard to the standards of review. Is that correct? Could you expand on that?

Ms. PROKOP. Yes. As I stated in my testimony, in H.R. 2659 the standard that was set out was reasonableness. I really have no problem with that standard if the committee wants to adopt it. However, by virtue of another provision you have preserved all the rights that normally an employee might have under any other law.

What in effect you have done by those two I consider inconsistent provisions, you have set a reasonable standard and yet preserved that same individual's right to a preponderance of the evidence. One, as you know, is a higher standard of review and one is lower, and I have pointed out some of the consequences that might flow from that.

Mr. HARRIS. This subcommittee is very cognizant of the different standards of review. We have spent a great deal of time on it.

Ms. PROKOP. I certainly didn't mean to lecture anyone on this subcommittee but I found that to be a problem. I offered in my testimony a couple of ways. You might have more creative ideas than I on that.

Mr. HARRIS. I view with some trepidation getting back into the area of whether we move from reasonableness to preponderance.

Mr. KINDNESS. If you could approach it with the good humor that presently prevails, there should be no problem.

Mr. DANIELSON. We find that most of our problems, if you back off and look at them from a little distance, are kind of silly. We just try to work them out.

Ms. PROKOP. Having dealt all year with the minutia of substantial versus preponderance, I must say I don't consider such a discussion silly or I couldn't justify my last year.

Mr. HARRIS. May I inquire as to whether or not the Merit Protection Board is adequately staffed in order to handle any additional responsibilities that might flow from this legislation?

Ms. PROKOP. The answer is no. As you know, I have been to Congress this year with statements that I did not have adequate staff to handle the cases before me and I won't reiterate my complaints except to share with the members of the committee that I inherited a backlog of approximately 4,600 cases and I did not have adequate funds. I have been to Congress and explained that both to the House and the Senate.

Mr. HARRIS. Have you explained it to OMB?

Ms. PROKOP. I have been to OMB several times. I did obtain my supplemental in full. I have and OMB bypassing my legislation and did come to the Hill through that bypass provision.

Mr. HARRIS. Do I understand that the Civil Service Comission, by virtue of the Civil Service Reform Act, was supposedly split in two and became the Office of Personnel Management and the Merit Systems Protection Board with the notion instead of having one hat for both management and employee; we now have two basic agencies, one representing management, the other representing the employer, basically your function. And when they divvied up the pie with regard to the budget, 90 percent of the funds went to OPM

and 10 percent went to Merit Protection Board. Is that an unfair observation?

Ms. PROKOP. No, that is not an unfair observation. Only I think the imbalance of funds was even a little greater than that.

Mr. HARRIS. I am known to be conservative. Now we are talking about a system that would tend to rely on you a great deal with regard to proper implementation of the system; isn't that correct?

Ms. PROKOP. Yes. I wanted to comment, if I might, on my discussion of my supplemental and 1980 budget, if those are approved, then I will be in a position to handle what I inherited. I, at least, have a clean slate at that point, in my judgment. But I would like to make clear that I am in no position, at least at the present time, to undertake a responsibility laid on top of that. I would not have the staff to absorb it and would need whatever extra staff such a demand would place on the Board.

I have sought from Justice and OMB what anyone might estimate would be the workload flowing from this bill and I think in fairness no one has been able to provide me with what the workload would be.

I do not have a slack in my staff. That is all I was trying to say to you at this time.

Mr. HARRIS. I think it is important for the subcommittee to have this testimony. I think we do have folks who are interested in developing programs—folks in Congress—and applying personnel ceilings at the same time. I think it is interesting to see how well programs are implemented when you create them and then have personnel ceilings so you don't have any staff to run them.

I realize that it is nice for a public official to say, I have created this program; and it is nice for him to say, I have put that personnel ceiling on. But in the process you get very poor government. I think you have to say with this legislation we have to staff it correctly or we don't have it.

Thank you very much for your testimony.

Ms. PROKOP. If I may just comment briefly, I think that is very important. I was somewhat confined by not wanting to take up 2 hours of the committee's time in my testimony. I think that underscores some of the merger that I was speaking about this morning.

I have a mechanism that is already set up for a hearing procedure that would make, in my judgment, the handling of these cases much easier incrementally to impose than to set a similar structure or something thereabouts in each agency.

I think it was with that concern, and having gone through this experience of the last year. But I have truly faced that, that where Congress gave me certain directives and then without the adequate funding, that is the problem you are wasting your time enacting a bill if there is not adequate funding.

I might also comment that I might have some very good news, not particularly for this committee, but could relate to the duties to be assigned under this act, if enacted.

We are showing a tremendous decrease in our caseload at the present time even with new procedures. We have just developed new procedures for the Board and our trend—if it holds I will be to Congress in a month or so—shows extraordinary inroads through procedural corrections into our backlog.

I will be up later. But I do think there are some procedural innovations that can be done in our administrative structures that are extremely helpful.

Mr. DANIELSON. You have reduced the backlog?

Ms. PROKOP. I am reducing. Our trends are coming very well at the present time. I am extremely pleased with last month's records. I don't want to say that we have a trend going, but we are jumping down very fast and project that perhaps particularly with the additional people we will get we will have the backlog gone in 12 months.

Mr. DANIELSON. Mr. Kindness.

Mr. KINDNESS. Just one thing. The regulations governing hearing procedures were mentioned in your testimony. I am asking this as a question pretty much to the subcommittee, as to whether it might be desirable if those regulations be submitted for either the subcommittee's record or review in connection with considering what we ought to do in the markup of this bill.

I don't know that we need to make them a part of the record but I think it would be helpful to see those.

Mr. DANIELSON. I have already asked if we can have those.

Ms. PROKOP. We certainly will provide that. They are not long. This is the total sum of our regulations so we will certainly provide them for the committee's counsel.

Mr. KINDNESS. Thank you.

Mr. DANIELSON. Are there further questions or observations? I have none. Thank you very much for your help. The committee does appreciate it.

Dr. Bermann, you, too. This is one of the better mornings. Thank you and we will be in touch with you.

For the information of the subcommittee, we do have a statement from the American Bar Association. The witness was unable to attend. Without objection, I would like to have it included in the record.

There is no objection. It is included.

[The prepared statement of Mr. George follows:]

51-110 O - 79 - 11

AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

B. JAMES GEORGE, JR.

IMMEDIATE PAST CHAIRPERSON

CRIMINAL JUSTICE SECTION

ON BEHALF OF
THE
AMERICAN BAR ASSOCIATION

CONCERNING
PROPOSED AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT
H.R. 2659

BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 19, 1979

Mr. Chairman and Members of the Subcommittee:

I am B. James George, Jr. I am immediate past chairperson of the American Bar Association's Section of Criminal Justice, and Section delegate to the ABA House of Delegates from that Section. It is a privilege to appear before this Subcommittee on behalf of the American Bar Association concerning proposed amendments to the Federal Tort Claims Act (H.R. 2659, 96th Congress).

Before I address the merits of the bill before you, I would like to say a word about the Criminal Justice Section of the ABA, which has been carefully studying this legislation for some 18 months. Our Section includes representatives from all parts of the criminal justice system -- prosecutors, defense lawyers, public defenders, judges, law teachers, and members of the law enforcement community. It thus speaks for no one segment of the system, but attempts to reflect a balance in the policy positions it adopts on legislation.

The American Bar Association strongly supports early legislative enactment of provisions to render the United States civilly liable for constitutional torts based upon acts or omissions of federal employees; the Association's Board of Governors reaffirmed its position to that effect in January 1979, based on action taken earlier in June, 1978. [The 1978 ABA position appears in Joint Hearings Before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on Amendments to the Federal Tort Claims Act: S. 2117, S. 2868, and S. 3314, 95th Congress, Second Session, Part 2, 530-43 (June 15, 1978); the January 1979 document is attached.] This in turn comports with policies favoring governmental tort liability for intentional police misconduct embraced by the ABA House of Delegates through adoption of the Association's Urban Police Function Standards [American Bar Association Standards Relating to the Administration of Criminal Justice, Urban Police Function §§ 1-5.1, 1-5.3(a)(ii), 1-5.4(2nd ed., Approved Draft 1979); a copy of these standards and relevant commentary is attached].

Creation of adequate civil redress for aggrieved citizens, especially those who are not criminals and thus can derive no direct functional benefit from invocation of exclusionary rules of evidence, is a long-overdue legislative measure; federal legislation not only will address directly a key matter of federal constitutional concern, but also may well provide a helpful pattern for state legislatures and an encouragement to them to provide equivalent citizen redress

against intentional torts of state and local law enforcement officers.

A major concern of the Association, however, arose from the provision of the 1978 bills immunizing individual federal employees from personal civil liability for their intentional torts; this is continued in the amended version of 28 U.S.C. § 2679(b) proposed in H.R. 2659. In an era in which accountability of public employees for their improper activities is stressed rather than minimized, it seemed to the Association incongruous to exempt an employee from personal liability for intentional acts even though the United States itself is not allowed to assert an absolute or qualified immunity which the employee might have available if personal liability were urged by a plaintiff [§ 2681(b), as delineated in § 3 of H.R. 2659]. Nevertheless, the Association recognizes that there are important practical and pecuniary difficulties in allowing personal liability to coexist with governmental responsibility. Accordingly, the Association accepts exclusive federal tort liability subject to three conditions:

(1) Disciplinary proceedings must ensue against a federal employee or former employee or presidential appointee for whose intentional misconduct the federal government has acknowledged liability or been adjudicated civilly liable. Although in the abstract one might argue for the availability of administrative remedies without a condition precedent of civil action against the federal government, practical considerations suggest that aggrieved citizens be required to pursue tort remedies before disciplinary proceedings are commenced. The pending legislation appears to meet satisfactorily the first of the Association's concerns.

(2) Aggrieved citizens should be able both to initiate and to participate in agency disciplinary proceedings. The first aspect of this concern is dealt with adequately through the proposed sections of 28 U.S.C. §§ 2683(a), 2684(a), 2685(b) [§§ 8 of H.R. 2659]. However, the Association believes the proposal is deficient as to the second concern, in that it leaves to the exclusive discretion of the agency head whether a person requesting a disciplinary inquiry will be allowed to participate in a hearing [§§ 2683(c) (lines 8-12, page 13); 2684(b) (lines 20-25, page 14); 2685(b) (lines 20-25, page 19) of H.R. 2659)]. The bill rightly contemplates that in many instances the transcripts and documents generated in the course of earlier proceedings will be a sufficient basis for administrative sanctions, particularly if their adequacy is not contested by either complainant or respondent. If, however, additional data are to be adduced, the

Association believes that the complainant should be allowed to participate unless the agency head can advance affirmative reasons why that should not be the case; fairness suggests that a respondent must have correlative rights.

As an analogy, one may consider participation by prison residents in major misconduct disciplinary proceedings; the entitlement to participate is generally assumed unless the institution can advance valid reasons militating against presence and participation [see, e.g., Wolff v. McDonnell, 418 U.S. 539, 566 (1974); Lawrence v. Department of Corrections, 88 Mich. App. 167, 276 N.W. 2d 544 (1979); Mich. Admin. Code R. 791.3315(3), (4) (1977); American Correctional Association Commission on Accreditation for Corrections, Manual of Standards for Adult Correctional Institutions §§ 4325, 4329, 4331 (1977)].

Whatever the specifics, the Association urges an opportunity to participate by aggrieved persons much more strongly provided for than in H.R. 2659 as it now stands.

(3) Aggrieved persons should be entitled to appeal a refusal to discipline or inadequate disciplinary measures first to an administrative review body and ultimately to the courts. H.R. 2659 appears most adequately to meet this point through its provisions for administrative review by the Merit Systems Protection Board or its counterpart in certain special instances [28 U.S.C. § 2686(a), proposed in § 8], and judicial review of administrative action or inaction at the instance of the aggrieved person [28 U.S.C. §§ 2484(d), 2685(c), proposed in § 8].

Even though administrative disciplinary proceedings may prove more effective in the long run in regulating official misconduct than personal tort liability, the Association has been reluctant to endorse a total, immediate abandonment of traditional remedial concepts. Therefore, it proposed either of two additional elements to be included in the legislation as a condition of its endorsement. H.R. 2659 has both:

(1) The statute should be of limited duration. It should have a sunset provision which will restore the earlier doctrine particularly that of individual civil liability, after a reasonable test period. Section 10(c) sets a five-year limitation on the life of the statute from the time of its enactment; new legislation would be required if the revised federal law were to be continued.

(2) An evaluation commission should review experiences under the new legislation and make findings and recommendations to the Congress as to whether the statute should be extended with or without changes. Section 10(c) of H.R. 265[illegible] provides for a report to be filed with the Congress by the Attorney General and office of Personnel Management setting forth recommendations as to continuation of the amendments.

The bill thus contains two provisions allowing for evaluation after a set period of time.

In summary, subject to the recommendations relative to the right of an aggrieved person to participate in contested disciplinary proceedings requiring additional fact determinations, the American Bar Association strongly endorses H.R. 2659 and urges its prompt enactment by the Congress.

ATTACHMENTS:

Appendix A - The Association's policy, adopted in January, 1979

Appendix B - Excerpt, ABA Standards Relating to the Urban Police Function[1] (Approved, 1979)

[1] Material referred to as Appendix B has been included in the committee's legislative files on this bill.

APPENDIX A

January, 1979 ABA Policy

The Board of Governors has received and considered a report of action taken by the Council of the Criminal Justice Section on December 9, 1978, at Washington, D.C., in reconsidering its earlier position regarding legislation proposed by the U.S. Department of Justice to amend the Federal Tort Claims Act (S. 2117 and H.R. 9291, 95th Congress).

In view of the persuasive vote of the Council (11-2) in revising its previous position on this legislation, as set forth in the accompanying report, the Board hereby approved the Council's action and adopts the following resolution as a substitute for the Association's position taken June 10-11, 1978, at Saratoga Springs, and reported to the House of Delegates at the 1978 Annual Meeting in New York:

RESOLVED, That the American Bar Association approves in principle legislation to amend the Federal Tort Claims Act to create an exclusive remedy against the United States for constitutional torts based upon acts or omissions of United States employees, provided it incorporate these principles:

1. That, in return for waivers by the United States of sovereign immunity and the right to assert the good faith of such employees as a defense, the aggrieved party will have an exclusive remedy against the United States for such torts, thus according statutory immunity to all federal employees in such instances; and to assure that employees nevertheless remain accountable for their acts, the legislation will provide for an aggrieved party to initiate and participate in agency disciplinary proceedings against an employee alleged to have committed a constitutional tort; and further, to permit such aggrieved party to appeal to the Civil Service Commission and thereafter to the federal courts if he/she believes the agency disciplinary sanctions imposed were too lenient.

2. That such legislation provide for either a sunset provision or an evaluation commission expressly designed to collect complete data on all pertinent experience during a specified trial period and to make findings and recommendations thereon which will aid the Congress in determining whether such legislation should be terminated or extended -- with or without change.

Mr. DANIELSON. This will conclude the hearings of substance on this bill. We will go into markup following the August district work period.

Tomorrow we meet again in connection with H.R. 239 in this room.

The subcommittee stands adjourned.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

ADDITIONAL MATERIAL SUPPLIED TO THE COMMITTEE

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

OCT 04 1979

Honorable George E. Danielson
Chairman, Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to several communications from your Subcommittee concerning H.R. 2659, the proposed amendments to the Federal Tort Claims Act. A June 21st letter from the Subcommittee's counsel, William Shattuck, has asked the Department to comment on the statements of representatives of the American Civil Liberties Union, Congress Watch, and the Fund for Constitutional Government. On June 22, in a letter to the Attorney General, you asked whether the Department continued to support its description of the terms "scope of employment", "color of office" and "constitutional tort" contained in a July 18, 1978, letter to the Subcommittee from Assistant Attorney General Babcock, a copy of which is attached. I have delayed the response to both of these requests in order to undertake a series of meetings with your staff and with other groups.

Although the discussion of scope of employment and color of office in Assistant Attorney General Babcock's 1978 letter needs no amplification, it may be helpful to consider defining the term "color of office". One such definition could read as follows: "For the purposes of this chapter and section 1346 of this title, an employee is acting under color of his office or employment when he appears or acts such that his acts would be viewed by a reasonable man in the position of the claimant as official acts of a government employee acting as such."

The term "constitutional tort" as described in our 1978 letter, requires further discussion. Assistant Attorney General Babcock's letter noted that while the Supreme Court had, for the moment, limited the concept of a constitutional tort to

violations of the Fourth Amendment, 1/ various lower courts had implied causes of action for damages based on constitutional guarantees contained in the First, Fifth, Sixth, Eighth, Ninth, and Thirteenth Amendments. Her letter cited the Fifth Circuit's opinion in Davis v. Passman, 571 F. 2d 783 (1978). Although we stated that the recognition of activities constituting a constitutional tort should best be left to litigation in the Federal courts, we declared our belief that not all unconstitutional conduct would give rise to constitutional tort claims.

As you know, on June 5th, the Court decided Passman, holding that an action for damages for employment discrimination based on sex can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. 2/ The Court noted that its holding did not mean that every tort by a Federal official may be redressed in damages. 3/

The Department continues to maintain that not every constitutional violation creates a tort. For example, a constitutional tort should not be implied when an alternative remedy is available. In Bivens, the Court noted the absence of an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." See Bivens, supra, at 397. In Passman, the Court declared that "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." 4/

Other cases that speak of the inappropriateness of finding a constitutional tort where there are alternate statutory remedies are Torres v. Taylor, et al., 456 F. Supp. 951 (S.D.N.Y. 1978), which refused to imply Fifth and Eighth Amendment causes of action when the Federal Tort Claims Act was available; and Neely v. Blumenthal, et al., 458 F. Supp. 945 (D.D.C. 1978), which held that Title VII remedies precluded assertion of constitutional discrimination claims and that "core constitutional rights" were not involved. Thus, a constitutional tort may be recognized by the courts as a proper action for money damages for the violation of a constitutional guarantee for which no alternative remedy is available. But see Hernandez v. Lattimore, No. 78-2098 (2d Cir. June 7, 1979). It is possible that this issue may be decided by the Court this term in Carlson v. Green, No., 78-1261.

1/ See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

2/ Davis v. Passman, U.S., No. 78-5072, decided June 5, 1979.

3/ Id at 19.

4/ Id.

Although a point-by-point rebuttal to the objections of the three organizations, many of which have been answered before, would probably be of little use to the Subcommittee, there are several points which should be made. For example, the ACLU statement calls for the bill to be amended to provide the same remedial scheme for intentional torts as is provided for constitutional torts. For example, trespass is cited in footnote 11 of the ACLU statement as an intentional tort for which the Government must not only be liable, but liable under the same remedial mechanism provided for constitutional torts. The Department would oppose such an amendment because the waiver of the good faith defense, liquidated damages, attorney fees and a disciplinary inquiry should not be provided for intentional torts which are not constitutional torts -- torts which are already recognized under the Federal Tort Claims Act.

The ACLU statement appears to support the contention of the Congress Watch statement that "History has plainly demonstated that we cannot allow agencies the right to discipline or not discipline their employees." But, even the assumption of a current lack of agency discipline does not justify punishing the agency by preventing it from disciplining its employees. We continue to believe that this legislation should not alter any of the basic relationships between an agency and its employees. Accordingly, we would oppose amendments designed to provide employees with the right to a hearing or to counsel.

The statements of the Fund for Constitutional Government and the ACLU both suggest that the Government be liable for punative damages for constitutional torts. We submit that the rationale for punative damages against individuals -- to punish the defendant as well as make the defendant whole -- is inapplicable to the Government as the defendant. Punishing an individual defendant by requiring him to pay punative as well as remedial damages acts as a deterrent to him and to others. But, it is questionable whether a Government employee or even an agency would be deterred by the prospect of the taxpayers having to pay more than remedial damages to a tort plaintiff.

I hope that our views have been useful, and I trust that we can be of further help to the Subcommittee.

Sincerely,

Alan A. Parker
Assistant Attorney General

Attachment

Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

July 18, 1978

Honorable George E. Danielson
Chairman, Subcommittee on
Administrative Law &
Governmental Relations
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Pursuant to your request for the Justice Department's views on the meaning of the terms "scope of employment" and "color of office" as used in H.R. 9219, and the concept of a constitutional tort as envisioned by the bill, we have set forth the following discussion of each.

Scope of Employment
And
Color of Office

Both phrases are terms of art and do not have formal definitions. It is our customary practice in making a "scope of employment" evaluation to begin with an actual instance of employee conduct and measure it against a wide variety of considerations including an employee's job responsibilities, his instructions from superiors, his perceptions of the conduct's propriety and necessity within those areas, and his agency's own evaluation of whether the conduct was within the parameters of his job functions.

Notwithstanding the flexible approach the Department takes when evaluating whether an employee's conduct was undertaken within the scope of his employment, several general but non-limiting observations can be made. First, conduct within the scope of one's employment would normally include actions which are motivated by an intention to further the interests of the Government, so long as those acts are reasonably related to the duties and responsibilities of the employee's position. The fact that an employee's conduct might be unlawful or unconstitutional would not by itself indicate that the conduct was undertaken outside the scope

of employment. The operator of a government motor vehicle involved in an accident while driving in excess of a posted speed limit on route to an official destination would be considered as acting within the scope of his employment notwithstanding his violation of the speed limit. See generally, Avery v. United States, 434 F. Supp. 937 (D. Conn. 1977) (unlawful or unconstitutional conduct may be within scope of employment).

Conduct taken under "color of office" refers to conduct which an employee represents as being related to a job responsibility, regardless of whether in fact such a relationship exists. If the conduct is related to an employment responsibility and is undertaken to further an interest of the employing agency, the conduct would be both within the scope of employment and under color of office. If the conduct represented as employment-related were not, but were instead undertaken for personal gain, the conduct could be characterized as being performed under color of office but not within the scope of employment. For example, a law enforcement officer who, upon presentation of his credentials, seizes illegal gambling proceeds as evidence incident to a lawful arrest would be acting both within the scope of his employment and under color of his office. The same officer, however, who seizes the proceeds upon presentation of his credentials in order to obtain funds to satisfy a personal debt would not be acting within the scope of employment but would be acting under color of office.

H.R. 9219 provides that for tort claims alleging tortious conduct under the Constitution, the United States shall be exclusively liable if the conduct was undertaken by one of its employees either within the scope of his employment or under the color of his office. This is so because in either event the United States, as employer, armed the employee with the indicia and powers of office and should be civilly responsible for any abuse of that office.

As we hope the foregoing illustrates, it would be a mistake to attempt to define more closely the meaning of scope of employment or color of office. Flexibility to apply the terms in the framework of particular cases has proven advantageous and often necessary in resolving the many varied scope of employment determinations with which we are confronted.

Concept of a Constitutional Tort

The Supreme Court has held that violation of a Fourth Amendment right gives rise to a claim for money damages in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Bivens, the Court noted that damages have been regarded as the "ordinary remedy for an invasion of personal interests in liberty," and implied a cause of action for money damages for the invasion of plaintiff's Fourth Amendment rights in the course of a search. The Court based its result in part on a series of cases implying a cause of action from federal statutes that created federal rights but provided no federal remedy. See generally, Cort v. Ash, 422 U.S. 66 (1975).

Although the Supreme Court has never extended its initial position in Bivens to cover rights secured by amendments to the Constitution in addition to the Fourth Amendment, many lower courts have cited the decision as authorizing implied causes of action for money damages based on constitutional guarantees in addition to those contained in the Fourth Amendment. These include actions based on violations of the First, Fifth, Sixth, Eighth, Ninth, and Thirteenth Amendments. See, Davis v. Passman, 571 F.2d 793, 795 n. 2.

The decisions of lower courts approving and rejecting the extension of Bivens to create causes of action for violations of constitutional rights in addition to the Fourth Amendment have led to the evolution of a distinct body of federal law containing both trends and conflicts within and between the circuits and their district courts.

Although the Department of Justice does not agree with the decisions reading Bivens expansively, we recognize that this area of constitutional tort law is in a relatively early stage of development. In recognition of the continuing conflict among lower courts over the extent to which Bivens should be enlarged, and the lack of any Supreme Court guidance subsequent to Bivens, the Department believes it best to leave the recognition of a constitutional tort to the litigation process in the federal courts.

It is the Department's view, however, that a violation of a person's constitutional rights by conduct of a government employee does not necessarily constitute or define a

constitutional tort. Greenya v. George Washington University, 512 F.2d 556, 562 n. 13 (D.C. Cir. 1975). There may be many instances of unconstitutional conduct that would not give rise to a tort claim under the Constitution or the Federal Tort Claims Act. An example of such an instance would be the arbitrary or capricious administration of an agency regulation resulting in the denial of due process to a person affected by the action. If suit were brought by the individual against the United States under H.R. 9219, based on a Bivens theory for the alleged tortious violation of Fifth Amendment rights, the Department would likely argue that the agency conduct, albeit unconstitutional, did not give rise to a tort cause of action for money damages under the Fifth Amendment.

I trust the foregoing discussions will be of assistance to the Committee. Each area presents its own unique difficulties in imposing standardized criteria. We believe, as earlier noted, that aside from our overview comments, a determination of whether conduct was within the scope of one's employment or constitutes a constitutional tort, is best resolved on the facts of each case rather than through application of standardized criteria which cannot be expected to anticipate all future claims of constitutionally tortious conduct.

Very truly yours,

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